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No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

CITY OF DANVILLE, KENTUCKY - - *Petitioner*

versus

KENTUCKY RIVER AUTHORITY;
PHILLIP J. SHEPHERD;
CHARLES W. CARR; TOM DORMAN;
JUDGE W. NEAL CASSIDY;
DR. DONALD C. HANEY;
MARTIN HOWARD LOWRY;
EDWARD FOREE; GREG GINTER;
THOMAS M. JONES;
RALPH E. MCCLANAHAN; and
BETTY F. WHITAKER - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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93 pp

QUESTIONS PRESENTED

1. May the Kentucky River Authority, a watershed management agency of the Commonwealth of Kentucky, impose a special assessment or fee upon water consumers, including the City of Danville and its residents, without conferring special or peculiar benefits, the value of which are reasonably related or roughly proportional to the amount of the assessment?

2. Does an absolute rule adopted by Kentucky's highest court that persons residing within the watershed basin of the Kentucky River are conclusively presumed to receive a benefit from the Kentucky River Authority, a watershed management agency of the Commonwealth of Kentucky, violate the due process of law and equal protection clause of the 14th Amendment of the United States Constitution?

3. Should the protection against the taking of property without due process of law of the 5th and 14th Amendments to the United States Constitution be extended to apply within the context of special assessments or fees imposed by state administered watershed management districts?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, City of Danville, Kentucky, prays that a writ of certiorari issue to review the Order Denying Discretionary Review entered by the Supreme Court of Kentucky, which Order permitted to stand the Opinion Reversing and Remanding entered by the Kentucky Court of Appeals.

CITATION TO PREVIOUS OPINION AND OPINIONS BELOW

(A) The Order Denying Discretionary Review entered November 13, 1996 by the Supreme Court of Kentucky, in *City of Danville, Kentucky* vs. *Kentucky River Authority, et al*, 96–SC–214–D (95–CA– 64), is reproduced in the Appendix to this Petition at page 1a.

(B) The Opinion Reversing and Remanding entered February 16, 1996 by the Kentucky Court of Appeals in *Kentucky River Authority* vs. *City of Danville*, (No. 95–CA–000064–MR), Ky. App., 932 S.W.2d 374 (1996) is reproduced in the Appendix to this Petition at 2a to 7a.

(C) The Opinion and Order entered December 9, 1994 by the Boyle Circuit Court in *City of Danville, Kentucky* vs. *Kentucky River Authority*, C.A. #94–CI–00278 (hereinafter referred to as "Trial Court Opinion") is reproduced in the Appendix to this Petition at 8a to 11a.

JURISDICTION

The Order Denying Discretionary Review was entered on November 13, 1996 by the Kentucky Supreme Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(A) This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(B) This case involves Kentucky Revised Statutes (KRS) 151.700 through 151.730, 151.990, entitled "Kentucky River Authority", the text of which is set out in the Appendix to this Petition at pages 12a to 23a.

(C) This case involves those administrative regulations adopted by the Kentucky River Authority and contained in 420 KAR 1:010 through 420 KAR 1:050, the text of which is set out in the Appendix to this Petition at pages 24a to 49a.

STATEMENT OF THE CASE

The Kentucky River lies completely within the boundaries of the Commonwealth of Kentucky. Historically, the locks and dams located on the Kentucky River were owned, operated, and maintained by the U.S. Army Corps of Engineers (Corps). In the late 1970s, the Corps began to lose interest in its continued operation of the locks and dams and indicated that in time its responsibility with regard to the river would be terminated. In 1982, the General Assembly (legislature) of Kentucky created the Kentucky River Task Force, which in conjunction with the Kentucky Natural Resources and Environmental Protection Cabinet (NREPC), undertook to insure the continued operation and maintenance of the locks and dams upon the Kentucky River. In 1986, the General Assembly enacted KRS 151.700 through 151.730, which legislation created the Kentucky River Authority (KRA), an agency of the Commonwealth of Kentucky. The statute was amended in 1988, 1990, 1992 (adding 151.725 and pertinent portions of 151.990), and again in 1996 (subsequent to the commencement of the subject litigation).

The stated policy of the Kentucky General Assembly in the creation of the KRA is:

> . . . to protect the health and welfare of the citizens dependent upon this system (Kentucky River) of locks

> and dams for their source of clean water, and to that end, the Commonwealth shall provide for the proper maintenance of the Kentucky River locks and dams through the Kentucky River Authority. (KRS 151.700)

In order to carry out its purposes and objectives, the KRA was empowered generally to construct, repair, and maintain the locks and dams on the Kentucky River; to issue revenue bonds payable from fees collected from all facilities using water from the Kentucky River or its tributaries; to promulgate administrative regulations; to coordinate activities of state agencies impacted by the Kentucky River resources; to develop plans for the protection, conservation, and preservation of water within the Kentucky River basin; to develop recreational areas within the basin; and to "Exercise all other powers necessary to perform its public purpose..." [KRS 151.720(10)].

The watershed management district over which the KRA has authority includes all or part of 42 counties within Kentucky. The KRA is the Commonwealth of Kentucky's pilot program for watershed based management initiatives. Kentucky has a total of 120 counties.

Pursuant to the enabling statute, the KRA promulgated and adopted administrative regulations in December of 1993 (see Appendix). These regulations include a complex system of fees to be assessed against those who withdraw water from the Kentucky River and its tributaries. The regulations designate two distinct types of water withdrawal fees. "Tier I" fees provided for in 420 KAR 1:040, are assessed for the purpose of funding administrative expenses. "Tier II" fees provided for in 420 KAR 1:050, are designated to effectuate provisions of KRS 151.730 relating to the payment of the principal and interest of revenue bonds issued by the KRA to construct and maintain dams, locks, and related capital projects.

At present, the KRA claims the authority to assess Tier I fees against all consumers of water (users) who withdraw water from any source lying within the Kentucky River basin; whereas, Tier II fees are assessed only against "main stem" users (those who draw water directly from the Kentucky River). However, there is no assurance that non–main–stem users will not be assessed Tier II fees in the future. At present, Danville is being assessed Tier I fees only.

The original statute enacted by the Kentucky General Assembly did not prescribe the method or amount of assessments against those entities withdrawing and using water within the area of the Kentucky River basin, but vested that power in the directors of the KRA. The KRA's adopted regulation 420 KAR 1:040, § 2(2) provides in part:

> . . . a person who withdraws surface water or groundwater from the Kentucky River basin shall pay a Tier I fee based on gross withdrawal.

In 1996 (subsequent to the trial court decision herein), the Kentucky legislature enacted KRS 151.723, entitled "Water Use Fees", which provides in part:

> The rate of the water use fees collected by the authority shall be set for each year of the biennium based upon a total amount of funds necessary to carry out only those functions, projects, and expenses authorized by the General Assembly in the authority's biennial budget.

It is significant to note that the KRA determines the amount of the assessments by first determining the total amount of its annual budget and then simply funding that budget by charging the necessary amount for each unit (gallon of water) of usage. Such was the method of setting the assessment at the time this case was litigated and that method has now been codified by the 1996 amendment to the statute.

The City of Danville withdraws no water from the Kentucky River. The City of Danville withdraws water from Lake Herrington, formed by the damming of the Dix River, which is a tributary of the Kentucky River. The City of Danville owns its water plant and it sells water to residential, commercial, and industrial consumers both inside and outside the boundaries of the City, and some of which consumers are geographically located *outside* the Kentucky River basin.

From and since April 1, 1994, the City of Danville has been assessed fees by the KRA based upon the amount of its water withdrawal from Lake Herrington. Pursuant to KRS 151.720(5), all "facilities", including Danville, are permitted to "pass on all or any part of the fee" so charged by the KRA against individual consumers of water.

On July 12, 1994, the City of Danville filed a Complaint for Declaration of Rights (Complaint) in the Boyle Circuit Court, Civil Action #94–CI–278, challenging the constitutional authority of the Kentucky River Authority to impose assessments upon Danville under the enabling legislation and all regulations promulgated thereunder. Specifically, in paragraph #20 and #21, the Complaint alleged:

> 20. The City of Danville and its inhabitants derive no benefits from the existence or operations of the KRA which are different from the general benefits enjoyed by the inhabitants of the entire Commonwealth of Kentucky. The effort of the KRA to impose upon the City of Danville and its citizens a special tax or assessment for which no benefits are conferred constitutes an unconstitutional exercise of power, violative of the constitutional guarantees of due procees of law, equal protection of the laws, and the prohibition against the taking of private property without just compensation.
>
> 21. In the alternative, the amount of the assessment against the City of Danville is in excess of any special benefits conferred upon Danville and its inhabitants

> and consequently such action violates those constitutional protections enumerated hereinabove.

Although challenged upon other additional grounds, the foregoing allegations constitute the central theme under which the case was pursued and decided by the lower courts.

The case was tried before the trial court without jury. Extensive evidence was meticulously presented by Danville establishing the fact that Danville and its residents would receive no actual benefits from the activities of the KRA, or in the alternative, no benefits commensurate with or proportional to the assessments or fees imposed. The trial court stated in its Opinion and Order entered December 9, 1994 (at pages 1–2):

> . . . KRA has imposed a fee upon all entities drawing water from the Kentucky River basin. This includes Danville. The fees imposed by KRA, if they can be sustained at all, must be sustained as user fees and not as a tax. To impose fees based on local improvements for the benefit of the public at large upon a select group of individuals, is not taxation but confiscation. 14 Eugene McQuillan, *The Law of Municipal Corporations* Sec. 38.02 (1987 rev. 3rd ed.). In order for user fees to be sustained, there must be a reasonable relationship between the amount of money extracted and the benefit conferred. *Norwood* v. *Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L. Ed. 443 (1898); Ba*rfield* v. *Gleeson*, Ky., 63 S.W. 964 (1901); *Casey* v. *Richland County Council*, 320 S.E. 2d 442 (S.C. 1984). Where no benefit is conferred, the user fees violate the constitutional constraints of due process of law, equal protection and the taking of property without just compensation.

The trial court held (at page 3):

> Because no benefit is conferred upon Danville by the KRA then the fees charged are unconstitutional and in violation of due process of law and equal protection

by taking property without just compensation.

The KRA appealed the trial court decision to the Kentucky Court of Appeals, which by a 2–1 Opinion reversed and remanded. The Kentucky Court of Appeals stated (at pages 5–6):

> The validity of special assessments and users fees depends on an analysis of the charge and the benefit received. Assessments and fees charged without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process and the constitutional prohibition against the taking of private property without just compensation. . .
>
> Various fees exist and are used to implement programs deemed desirable by the Commonwealth. Pursuant to KRS 224.20–050, for instance, emission fees may be collected from entities emitting air pollutants and may be used to fund the Commonwealth's air quality program. Although there may be no direct or immediate benefit to the payor of such fees, the use of the air and the contamination of it are sufficient to justify imposition of the fee.
>
> The fee in this case is based upon the actual use by the city of the Kentucky River water basin. Despite the city's contention that it does not need the services of the Authority, the General Assembly recognized a potential depletion of one of this state's most valued natural resources and took efforts to preserve the Kentucky River basin. The interest of the Commonwealth in protecting and regulating Eastern Kentucky's largest water resource is beyond question. An adequate and clean water source is essential to all it serves. In *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District, Ky., 311 S.W. 2d 378* (1958), the court rejected the contention that a statute was unconstitutional because it conclusively presumed that all land within a designated area would benefit from a surface drainage improvement.

> We think that in the case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area and the resulting general enhancement of values in the area. *Id.* at 382.

The Kentucky Court of Appeals, in reversing the trial court's opinion, held (at page 7):

> . . . Preservation of the Kentucky River basin is a benefit which obviously accrues to all within its boundaries. We therefore hold to be clearly erroneous the trial court's finding that no benefit to the City of Danville exists.

Following the decision of the Kentucky Court of Appeals, the City of Danville sought discretionary review before the Supreme Court of Kentucky. On November 13, 1996, the Supreme Court of Kentucky entered an Order Denying Discretionary Review.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions raised under the Fourteenth Amendment of the United States Constitution were raised initially by Danville in its Complaint for Declaration of Rights (as set forth above). The predominant theory under which the case was litigated before the trial court was that the imposition of an assessment or fee for which no benefits, or no commensurate or proportional benefits, were conferred, constituted an unconstitutional exercise of power, violative of the constitutional guarantees of due process of law, equal protection of the laws, and the prohibition against the taking of private property without just compensation.

Danville argued the applicability of *Norwood* v. *Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L. Ed. 443 (1898), throughout the litigation before the trial court and again in the appeal taken by the KRA before the Kentucky Court of Appeals.

The trial court, citing *Norwood* v. *Baker*, supra, held that no benefit was conferred upon Danville by the KRA and that "the fees charged are unconstitutional and in violation of due process of law and equal protection by taking property without just compensation."

Again, in the appeal taken by the KRA to the Kentucky Court of Appeals, Danville asserted its rights under the Fourteenth Amendment of the United States Constitution. The Kentucky Court of Appeals, though recognizing that the assessment of fees "without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process and the constitutional prohibition against the taking of private property without just compensation", found that "(p)reservation of the Kentucky River basin is a benefit which *obviously* accrues to all within its boundaries" (emphasis added) and held the trial court's finding of "no benefit to the City of Danville" to be clearly erroneous. The effect of the decision of the Kentucky Court of Appeals was to establish an absolute rule or conclusive presumption that a benefit was conferred by virtue of geographic location alone.

The City of Danville filed a Motion for Discretionary Review with the Supreme Court of Kentucky, but the motion was denied by Order Denying Discretionary Review entered November 13, 1996.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, INCLUDING NORWOOD V. BAKER, 172 U.S. 269, 19 S.Ct. 1987, 43 L.Ed. 443 (1898).

The landmark decision on the subject of special assessments and fees is the United States Supreme Court case of Norwood v. *Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898). The City of Norwood, Ohio, sought to assess adjacent property owners for the costs and expenses connected with condemnation proceedings related to the construction of a new road passing through the property. The City of Norwood enacted an ordinance assessing the adjacent owners on a "per front foot" basis. The United States Supreme Court held under the Fourteenth Amendment of the United States Constitution that the assessment was unconstitutional because it failed to consider whether or not a benefit was conferred upon the property owners. Although the Court recognized that abutting owners may be subjected to special assessment if the owners enjoy special or peculiar benefits accruing from the public improvements, the powers of the legislative body are not unlimited. At pages 278–279, Mr. Justice Harlan, speaking for the U.S. Supreme Court, stated:

> But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement...

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.

In the case at hand, Danville and its residents are being assessed a flat amount based solely on its geographic location within the area of the Kentucky River basin and without regard to any special or peculiar benefits derived from the activities of the KRA. The trial court found that "no benefit" was conferred upon Danville by the KRA. The Kentucky Court of Appeals *assumed* a benefit based upon Danville's geographic location within the area drained by the Kentucky River. The Kentucky Court of Appeals simply found "preservation of the Kentucky River basin is a benefit which *obviously* accrues to all within its boundaries" (emphasis added) and then without explanation or any basis in fact held the trial court's finding that no benefit derived to Danville was clearly erroneous.

By refusing to grant discretionary review, the highest court in Kentucky, the Supreme Court of Kentucky, has denied Danville the right to "question" the existence of any peculiar benefits and has established an "absolute rule" that any person who uses water within a certain geographical boundary is *in fact benefited,* without any right of the person to question the existence of a benefit or show the assessment is in excess of any benefits received.

We are cognizant that this Court rarely grants a writ of certiorari when the asserted error consists of erroneous

factual findings or the misapplication of a properly stated rule of law. At first blush, it might be thought that such is applicable herein. We must acknowledge that the Kentucky Court of Appeals paid lip service and correctly stated some of the applicable principles of law. However, a closer analysis of the ruling of the Kentucky Court of Appeals, examined in light of the specific directives of this Court in *Norwood*, supra, clearly reveals that the Kentucky court has misunderstood and has violated the specific directives of this Court.

This Court expressly prohibited such action in *Norwood*, supra (p. 279):

> . . . But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be q*uestioned by him in the courts of the country.* (Emphasis added)

This Court went on to say at p. 279:

> It is one thing for the legislature to prescribe it as a gener*al* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an *absolute rule* (emphasis added) that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and *without any right in the property owner to show* (emphasis added), when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

The Kentucky court has done precisely what this Court has stated it cannot do. The Kentucky court has estab-

lished an *absolute rule* or *conclusive presumption* based only upon geographical location that all residents of Danville are in fact benefited and the alleged recipients of such benefits have no right to question the matter. The Kentucky Court of Appeals made *no effort* to find any special benefit, or to quantify or measure the benefit, or to compare the value of the benefit against the amount of the assessment. Instead, the Kentucky Court held that the benefit is "obvious". Such an arbitrary declaration effectively denies Danville its rights under the Fourteenth Amendment of the United States Constitution and without question is a taking of private property without due process of law.

In the case at hand, the quotation from the Opinion of the Kentucky Court of Appeals as set forth above clearly reveals that the Kentucky court has established an *absolute rule* or *conclusive presumption* and has denied affected persons the right to *question* the assessment of fees in the state courts of Kentucky. This attitude of the Kentucky court is underscored in its adherence to the 1958 case from the Kentucky Court of Appeals (then the highest court in Kentucky) of *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, supra, noting the *Curtis* court had "rejected the contention that a statute was unconstitutional because it conclusively presumed that all land within a designated area would benefit from a surface drainage improvement" and then going on to cite *Curtis* at page 382:

> We think that in the case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area and the resulting general enhancement of values in the area.

Pursuant to its rights under the Fourteenth Amendment of the United States Constitution, as enunciated and

amplified in Norwood v. Baker, supra, the City of Danville had sought to *question* the right of the KRA to impose an *absolute rule* under which it imposed an assessment regardless of special benefits inuring to Danville. The trial court performed an exhaustive analysis of the evidence in the case and concluded that "no benefits" had been shown to inure to Danville. Without any effort to weigh or evaluate the benefits, if any, the Kentucky Court of Appeals simply stated that the benefit was *obvious*, that geographical location in and of itself was sufficient, and that it was permissible to "conclusively presume" that all land within a designated area would benefit from the improvement (citing *Curtis* at page 382).

More recent decisions of the United States Supreme Court have followed the holding in *Norwood*. The general principle that special assessments to meet the cost of public improvements must be commensurate with or proportional to the benefits received has been applied by this Court in various situations. In *Road Dist.* v. *Mo. Pac. R.R. Co.*, 274 U.S. 188, 47 S.Ct. 563, 71 L.Ed. 992 (1927), the state of Arkansas had imposed assessments against property owners, including a railroad company, for improvements made to a public road. The railroad company brought suit to annul the assessment on the grounds, among others, that it was arbitrary and unreasonably discriminatory and thus in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution. This Court held that although some benefits were shown to accrue to the railroad, the assessments against the railroad were so excessive as to constitute a violation of the due process clause of the Fourteenth Amendment. However, the Court held that a reduced assessment based upon *actual benefits* received would be appropriate.

In *Dolan* v. *City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed. 2d 304 (1994), this Court held that the City of Tigard had failed to show "rough proportionality"

between the exaction demanded by the city and the petitioner's proposed development. Whereas that case involved a planning and zoning "taking" under the Fifth Amendment of the United States Constitution, certain principles enunciated therein are instructive and applicable to the case at hand. The Court stated in *Dolan* at pages 315–316:

> The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co.* v. *Chicago*, 166 U.S. 226, 239, 41 L.Ed. 979, 17 S.Ct. 581 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 US 40, 49, 4 L.Ed. 2d 1554, 80 S.Ct. 1563 (1960).

In the case at bar, the citizens of Danville are being forced to bear a public burden which, in all fairness and justice, should be borne by the public of the Commonwealth of Kentucky as a whole. It is unfair to arbitrarily create geographical boundaries within the state and then require the taxpayers within those boundaries to foot the bill for improvements or services which benefit the state at large (even if we assume actual services are rendered). The Kentucky River impacts the state of Kentucky as a whole. Danville residents do not enjoy an equal protection of the laws when they are forced to financially support the Kentucky River basin, while residents of other river basins within the state of Kentucky have no similar obligation. All other water sources throughout Kentucky are protected through the Kentucky NREPC which is funded from the general revenues of the state. General improvements must be funded through general revenues and not by special assessments.

In the absence of clearly definable benefits and services to particular recipients, the cost of providing general governmental services must be borne by the populace at large. These types of services have historically been paid from the general revenues of the Commonwealth. It is arbitrary and unfair to assess fees against certain residents simply because they live within a particular geographic location.

This Court stated in Dolan, supra, at page 320:

> . . . We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

The "rough proportionality" test adopted in *Dolan*, supra, is not unlike the "peculiar benefits" or "substantial excess" tests enunciated in *Norwood*, supra. Unfortunately, the Kentucky court subscribes to none of these tests. The Kentucky Supreme Court has arbitrarily established an "absolute rule", a "conclusive presumption", which cannot be scrutinized or questioned by any citizen. The Kentucky court has denied the people of Danville their right to the protection of the Fourteenth Amendment of the United States Constitution.

2. THIS CASE IS BELIEVED TO BE A CASE OF FIRST IMPRESSION IN THE UNITED STATES, KENTUCKY BEING THE FIRST STATE WHICH HAS ATTEMPTED TO FUND A WATERSHED MANAGEMENT DISTRICT THROUGH THE IMPOSITION OF USER FEES UPON WATER CONSUMERS AS OPPOSED TO FUNDING THROUGH GENERAL TAX REVENUES, GOVERNMENTAL GRANTS, OR ASSESSMENTS AGAINST PROPERTY OWNERS ACTUALLY AFFECTED AND BENEFITED.

This case is believed to be a case of first impression in the United States. Although the watershed management concept has been present for a number of years, the state of Kentucky is believed to be the first state or watershed agency to attempt to fund its operations by the imposition of user fees or assessments against the consumer. Consequently, we can find no recorded cases, federal or state, where the validity of user fees and assessments for the funding of a watershed management agency have been litigated or judicially determined. Watershed management agencies are typically funded through the general revenues of the state, governmental grants, or assessments against the landowners in proportion to the benefits actually received. *Salyer Land Co.* v. *Tulare Lake Basin Water Stor. Dist.*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); *Associated Enter., Inc.* v. *Toltec Watershed Imp. Dist.*, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973).

The City of Danville has complained and asserted from the beginning that the KRA impacts generally the citizens of Kentucky and it should be funded from the general tax revenues of the state at large. As an example, proposed walking trails and recreational facilities would be open to the general public visiting from outside the state.

If this court does not issue a writ of certiorari, Kentucky will have succeeded in ushering in a system of "taxation" which is repugnant to both the Constitution of Kentucky and the Fourteenth Amendment of the United States Constitution. The Kentucky Constitution §171 requires that taxes "be levied and collected for public purposes only and shall be uniform... and all taxes shall be levied and collected by general laws."

If Kentucky is permitted to impose user fees for the funding and financial support of the KRA, without being required to meet any specific standard (other than geographical location) to test the actual benefits received, other states can be expected to follow a similar course.

The denial of fundamental fairness under the due process clause of the Fourteenth Amendment of the United States Constitution could not be more amply demonstrated than by the fact that many consumers of water from the Danville waterworks system do not even reside within the Kentucky River basin! Some residents of Boyle County (of which Danville is the county seat) reside within other river basins, including the Salt River basin and the Chaplin River basin. Nevertheless, these private citizens purchase water from the City of Danville and under the statute in question herein, KRS 151.700 et. seq., those citizens are subject to the imposition of the assessment upon their water bills. Without question, these residents enjoy "no benefits" from the KRA. In the situation of these residents, a more graphic demonstration of the denial of due process would be difficult to envision.

3. THE GROWING PROLIFERATION OF SPECIAL ASSESSMENT DISTRICTS WITHIN THIS COUNTRY HAS CREATED A COMPELLING NEED FOR THIS COURT TO EXTEND AND CLARIFY THE PROTECTIONS AFFORDED EVERY CITIZEN UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE BROAD PRINCIPLES ENUNCIATED IN NORWOOD V. BAKER.

The concept of watershed management enjoys an increasing presence within this country. The creation of the KRA represented its entrance into Kentucky. Although the term "watershed management" creates a praiseworthy vision or image, giving rise to such notions as conservation, preservation, and environmental protection — ideas universally accepted as good and beneficial to everyone — the words watershed management, constitute a vague term or concept. "The natural resources management field is replete with terms that carry powerful prescriptive and hortatory meanings but lack descriptive specificity" ("Watershed Management: Slogan or Solution?", by William

Goldfarb, *Environmental Affairs*, Vol. 21:483, pp. 483–509, 1994). "Watershed management" is being utilized as a device which permits state or local governments to exact money from the citizenry without adherence to certain constitutional limitations. It is akin to other types of assessments and user fees which have allowed governmental units to enhance revenues without adhering to the constitutional restrictions against the imposition or increase of taxes. An excellent article by Laurence J. Zielke, a partner in a law firm in Louisville, Kentucky, entitled "User Fees in Lieu of Taxes: Avoiding Constitutional Limitations" can be found in the *Urban Lawyer*, Vol. 23, No. 3 (Summer 1991). This article is reproduced in the Appendix herein at pages 50a to 61a.

In his article, "Watershed Management: Slogan or Solution?", supra, Prof. Goldfarb provides a comprehensive analysis of the complexity of watershed management and the proliferation of watershed agencies throughout the United States. Goldfarb discusses the transboundary nature of most watersheds, commonly defined as the drainage basin of a receiving body of water, and the intermunicipal, interstate, or international implications arising therefrom. Watershed management transcends many subjects or concerns, including water resource development, water pollution control, wetlands protection, and water conservation and allocation. These geographical variations and differing goals and objectives, which are sometimes competing, give rise to diverse constituencies and conflicting or overlapping jurisdictions "at the international, federal, interstate, state, substate regional, and local levels of government" (Goldfarb, at page 485). To illustrate the complexity and diversity of water resource issues, Goldfarb states:

> On the federal level, thirteen congressional committees and subcommittees, eight cabinet agencies, six independent regulatory agencies, and two Whitehouse

> offices are involved in establishing water policy. "An estimated 100,000 water–related entities exist locally; states have over 300 departments having water and water–related resources functions." (Citing Dean E. Mann, "Political Science: The Past and Future of Water Resources Policy and Management", in Water Re*sources Administration in the United States,* Martin Reuss ed., 1993)

To illustrate the variety of persons and entities interested in watershed management, Goldfarb reveals that within the past few years, at p. 498:

> . . . systematic initiatives for implementing watershed management have been proposed by the Association of Metropolitan Sewerage Agencies (AMSA), the Water Quality 2000 group, EPA, and the drafters of S. 1114, the Senate Clean Water Act reauthorization bill. [103rd Cong., 1st Sess. § 302 (1993)]

Despite the vast amount of attention which has been given in recent years to watershed management, it has not inspired "definite legal rules". "Watershed as a Public Natural Resource on the Federal Lands", by George Cameron Coggins, Virginia Env*ironmental Law Journal,* Vol. 11:1, 1991, at page 1. However, Prof. Coggins confirms that legal interest in watersheds is growing, that "many recent lawsuits and other disputes have revolved around watershed values, and even more are likely to arise in the future" (at page 2).

The growth and proliferation of watershed management agencies is further illustrated in an article entitled "The Watershed Protection Approach: Is the Promise About to be Realized?" by William E. Taylor and Mark Gerath, *NR&E,* Fall 1996, wherein it is stated at page 18:

> Most states are rapidly moving to a watershed based approach and many hundreds of citizen groups are becoming directly involved in those efforts. EPA has published a number of watershed protection guidance

> documents in the last year and maintains a site on the World Wide Web to discuss the approaches different states are adopting. EPA has even established a Watershed Academy to educate state managers on watershed protection strategies.

In the case at hand, both the City of Danville and the KRA have agreed from the beginning that the money to be extracted by the KRA from Danville and others is a special "assessment" or "user fee" for which a commensurate or proportional benefit must be conferred. It has never been claimed by the KRA that the money to be extracted was a "tax". As an apparent afterthought, subsequent to the trial court opinion, the KRA maintained that the assessment was nothing more than a regulatory fee under the state's exercise of a valid police power. Whereas the KRA never explained what was being "regulated" or what police power was being exercised, it is not really important. Regardless of whether it be called a special assessment, user fee, or regulatory fee, the Fourteenth Amendment of the United States Constitution requires that a proportional or reasonable benefit be conferred, that the fee charged must reflect the approximate value of the thing being used, or that the regulatory fee be reasonably related to the costs incurred by the regulating authority. *Alamo Rent–A–Car* v. *Sarasota–Manatee Airport Auth.*, 906 F.2d 516 (11th Cir., 1990); *Federal Deposit Ins. Corp.* v. *City of New Iberia*, 921 F.2d. 610 (5th Cir., 1991). A "rational basis" must exist between the system of (sewer) service charges and the costs incurred by the governmental authority. *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F.2d 1305 (9th Cir., 1982).

"A tax is universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service." *Long Run Baptist Ass'n* v. *Louisville & Jefferson County Metro. Sewer Dist.*, Ky. App., 775 S.W.2d 520 (1989), at page 522. The Kentucky court ruled in *Long Run Baptist*, supra, that the

revenues could not be excessive to support the service; that user fee revenues must be limited to the reasonable cost of providing the services; and that the process of establishing the fee and the actual fee itself must bear a relationship to the service or benefit provided. Otherwise, the fee is arbitrary, capricious, and violates the rights of equal protection and due process.

In distinguishing between a "fee" and a "tax", the appellate Court in the state of Washington has stated that if charges are intended to raise money, they are actually taxes. Conversely, if the charges are primarily tools of regulation, they are not taxes, *Teter* v. *Clark County*, 104 Wash. 2d 227, 704 P.2d 1171 (Wash. 1985).

These principles and applications of the Fourteenth Amendment of the United States Constitution are consistent with the rulings of the United States Supreme Court in *Norwood* v. *Baker*, supra; and *Georgia R. & Electric Co.* v. *Decatur*, 295 U.S. 165, 55 S. Ct. 701, 79 L.Ed. 1365 (1935).

The area of watershed management is an expanding phenomenon in the United States. Whereas the purposes and objectives of watershed management are laudatory, the method of funding such agencies present an important Fourteenth Amendment question. The funding mechanism employed by the state of Kentucky clearly violates the protections of the Fourteenth Amendment. The simplicity of the Kentucky user fee system makes it an attractive mechanism for other jurisdictions. Undoubtedly, if permitted to go unchecked, it will be utilized increasingly as watershed management districts spread further throughout the country.

It is of compelling importance that this court require a test, a set of criteria, or a standard for the imposition of fees which comports with the due process protections afforded under the Fourteenth Amendment. Whether the test

be that of "rough proportionality", "rational basis", "proportional benefit", "substantial excess", or some other similar standard, the urgency for some equitable test or standard is indisputable. The state of Kentucky has adopted "no test". The state of Kentucky has adopted an absolute rule that geographical location is a singularly sufficient criteria, a conclusive presumption not subject to question or scrutiny.

It is of critical importance that this Court expressly declare that states cannot "tax" their citizens under the guise of "user fees", and that if user fees are to be imposed, they must bear a relationship to the service or benefit provided. The imposition of user fees or assessments must be included within the protections of the Fourteenth Amendment of the United States Constitution. The same principles which were applied by this Court in *Norwood* v. *Baker*, supra, must be applied to the funding mechanisms within the area of watershed management agencies.

CONCLUSION

The Supreme Court of Kentucky has denied those persons within the Kentucky River basin, including Danville, the protections of the due process clause of the Fourteenth Amendment of the United States Constitution. The Supreme Court of Kentucky has established an absolute rule or a conclusive presumption, not subject to judicial challenge, that anyone located within a certain geographical boundary may be assessed a special fee without regard as to whether or not the amount of the fee is reasonably related, roughly proportional, or substantially in excess of any actual benefit conferred upon the payor. This result is squarely in conflict with the principles enunciated in Norwood v. *Baker*, supra, *Dolan* v. *City of Tigard*, supra, and the Fifth and Fourteenth Amendments of the United States Constitution.

With the recent explosion of the watershed management concept throughout this country, and the proliferation of watershed management agencies created by the states, it is of critical importance that this Court grant this Petitioner's Writ of Certiorari, not only for the purpose of requiring Kentucky to comport to the law, but for the purpose of extending the protections of the Fourteenth Amendment to the growing field of watershed management districts throughout this nation.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF KENTUCKY

96-SC-214-D
(95-CA-64)

CITY OF DANVILLE, KENTUCKY - - - - - *Movant*

v.

KENTUCKY RIVER AUTHORITY, Et Al. - - - *Respondent*

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Stephens, C.J., would grant discretionary review.

ENTERED: November 13, 1996.

/s/ Robert F. Stephens
Chief Justice

RENDERED: FEBRUARY 16, 1996; 2:00 P.M.
ORDERED PUBLISHED: JULY 5, 1996; 2:00 P.M.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 95-CA-000064-MR

KENTUCKY RIVER AUTHORITY;
PHILLIP J. SHEPHERD;
CHARLES W. CARR;
TOM DORMAN;
JUDGE W. NEAL CASSIDY;
DR. DONALD C. HANEY;
MARTIN HOWARD LOWRY;
EDWARD FOREE;
GREG GINTER;
THOMAS M. JONES;
RALPH E. MCCLANAHAN; and
BETTY F. WHITAKER - - - - - - - - *Appellants*

v.

CITY OF DANVILLE, KENTUCKY - - - - - - *Appellee*

Appeal From Boyle Circuit Court
Honorable Stephen M. Shewmaker, Judge
Action No. 94-CI-00278

OPINION REVERSING AND REMANDING

BEFORE: LESTER, Chief Judge; DYCHE and EMBERTON, Judges.

EMBERTON, JUDGE. The appellants, Kentucky River Authority and its members, appeal from a judgment entered by the Boyle Circuit Court holding that the appellee, City of Danville, received no benefit from the Authority, and therefore, the Authority is constitutionally precluded from collecting water use fees from Danville.

The controversy in this case arises from the Authority's interpretation of its enabling statute Ky. Rev. Stat. (KRS)

151.720, which was enacted in response to continuing problems and potential depletion of a valued natural resource, the Kentucky River. In 1990, the General Assembly enacted KRS 151.720 which mandates that the Authority protect the Kentucky River basin through watershed management. In 1993, the Authority enacted administrative regulations to implement the statutes including a two-tier fee schedule by which it charged the users of water from the river basin. Tier II fees are collected from entities withdrawing water directly from the main stem of the Kentucky River and are used by the Authority to finance specific capital construction projects designed to enhance the water available for the basin. Tier I fees, which Danville is designated to pay, apply to entities withdrawing water from anywhere in the Kentucky River basin, whether from groundwater or tributaries. These fees are used for projects benefiting the entire basin and are assessed at a uniform rate based upon use of the Kentucky River basin. They are not used for the general fund but only for Kentucky River basin management.

Danville withdraws no water directly from the Kentucky River but does from Lake Herrington on the Dix River which is a Kentucky River tributary. It also discharges water from its waste water treatment plant into a Kentucky River tributary.

Danville maintains that in order to assume jurisdiction over the Kentucky River basin the Authority must: (1) assume ownership of all U. S. Army Corps of Engineers property on or adjacent to the Kentucky River; and (2) publish a legal notice for ninety days of its intention to assume ownership. In 1982, when the Kentucky River Task Force was created in conjunction with the Natural Resources and Environmental Protection Cabinet, there was concern that the Corps would fail to maintain and operate the Kentucky River locks and dams. In such event, the legislature established a procedure, including a ninety-day notice requirement, for the Commonwealth to assume ownership. KRS 151.700(2).

There is no dispute, that pursuant to the original version of KRS 151.700(2), the Commonwealth did not assume ownership of the Kentucky River locks and dams. However, in 1990, the statute was amended by House Bill 920 and no longer requires ownership of the locks and dams to activate the authority of the Kentucky River Authority. It was the legislature's intent to enlarge the powers of the Authority and render it responsible for the conservation of the Kentucky River basin waters. Although criticized by the trial court as a practice subject to abuse, it is well established that the legislature is vested with the power to amend its statutes in a budget bill. *Commonwealth, ex. rel. Armstrong* v. *Collins*, Ky., 709 S.W.2d 437 (1986). Under current law, ownership of the locks and dams of the Kentucky River is not a statutory prerequisite to the implementation of the Authority's powers.

Danville apparently has a well functioning water system with adequate water supplies and leakage controls. It also has various programs in place to provide continuing conservation education. Arguing its self-sufficiency, Danville denies that it can benefit from the activities of the Authority and complains it should not pay the fees. The trial court agreed.

The parties have continually debated whether the fees assessed by the Authority are special assessments, taxes, or user fees. Obviously, if the fees are in effect taxes, the Authority is not a taxing district and any such delegation by the legislature would violate Sections 27 and 28 of the Kentucky Constitution. *Long Run Baptist Association, Inc.* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky. App., 775 S.W.2d 520 (1989); KRS 65.180. "A tax is universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service." Id. at 522. Taxes are a means for the government to raise general revenue without regard to direct benefits which may inure to the payor or to the property taxed. *Krumpelman* v. *Louisville & Jefferson County Metropolitan Sewer* District, Ky., 314

S.W.2d 557, 561 (1958). The fees imposed by the Authority for the purpose of fulfilling the statutory mandates cannot be equated with taxes. The funds generated from the fees are to be used for the specific purpose of conserving and controlling the waters in the Kentucky River basin and are incidental to the statute.

The validity of special assessments and users fees depends on an analysis of the charge and the benefit received. Assessments and fees charged without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process and the constitutional prohibition against the taking of private property without just compensation. *See Skidmore v. City of Elizabethtown*, Ky., 291 S.W.2d 3 (1956); *Portwood v. Falls City Brewing Company*, Ky., 318 S.W.2d 535 (1958); *Woolsley* v. *Big Reedy Creek* Watershed, Ky., 383 S.W.2d 135 (1964). Sewers, lighting and street improvements are, if used by adjoining property owners, benefits which directly accrue to the real property. *Casey* v. *Richland County Council*, 282 S.C. 387, 320 S.E.2d 443 (1984), relied on by the trial court, involved a county surcharge on water and sewer. The plaintiff, however, received no water and sewer services from the city. Since no benefit was received by the plaintiff, the court held that the surcharge violated the state constitution and was, in fact, a tax. *Id.* at 444.

Various fees exist and are used to implement programs deemed desirable by the Commonwealth. Pursuant to KRS 224.20-050, for instance, emission fees may be collected from entities emitting air pollutants and may be used to fund the Commonwealth's air quality program. Although there may be no direct or immediate benefit to the payor of such fees, the use of the air and the contamination of it are sufficient to justify imposition of the fee.

The fee in this case is based upon the actual use by the city of the Kentucky River water basin. Despite the city's contention that it does not need the services of the Authority, the General Assembly recognized a potential depletion of one of this state's most valued natural resources and

took efforts to preserve the Kentucky River basin. The interest of the Commonwealth in protecting and regulating Eastern Kentucky's largest water resource is beyond question. An adequate and clean water source is essential to all it serves. In Curtis v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958), the court rejected the contention that a statute was unconstitutional because it conclusively presumed that all land within a designated area would benefit from a surface drainage improvement.

> We think that in the case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area and the resulting general enhancement of values in the area.

Id. at 382.

Danville's primary contention is that it can, and has, taken care of the concerns of the General Assembly through its own efforts. While Danville's initiative is to be commended, the General Assembly believes that only state intervention and a uniform approach can assure the future of the Kentucky River basin. Perhaps, with the implementation of the new services provided by the Authority, Danville can divest itself of some of the responsibilities it has assumed. Preservation of the Kentucky River basin is a benefit which obviously accrues to all within its boundaries. We therefore hold to be clearly erroneous the trial court's finding that no benefit to the City of Danville exists. Yount v. *Calvert*, Ky. App., 826 S.W.2d 833 (1991).

The Tier I fees imposed by the Authority are designated for the payment of administrative costs while capital improvement projects are financed with Tier II fees. The language of KRS 151.720-730 provides that fees are to be collected from all facilities using the Kentucky River or its tributaries. In the 1994-96 Budget Bill, the General Assembly provided that Tier I fees shall be used for the

establishment of an administrative staff for the Authority and contractual services for water supply and quality studies. Although contained in the Budget Bill, it is an effective and lawful amendment. *Armstrong, supra.*

We find no merit in Danville's contention that the Commonwealth cannot claim ownership to the waters of the Kentucky River because of the Supremacy Clause and the Commerce Clause of the United States Constitution. A state has the power to control and conserve its water resources, and unless Congress expressly invokes reserved rights or the navigation servitude, the state has authority to control its internal waters. *City of Trenton v. New Jersey,* 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); *California* v. *United* States, 438 U.S. 645, 662, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).

The judgment is reversed and the case is remanded for entry of a judgment consistent with this opinion, including the award of past fees owed with interest at the statutory rate. We find no basis, however, for the imposition of a penalty.

LESTER, CHIEF JUDGE, CONCURS.
DYCHE, JUDGE, DISSENTS.

BRIEF FOR APPELLANTS:
Donald S. Dott
Jack B. Bates
Susan Rose Green
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLANTS:
Jack B. Bates
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES:
Edward D. Hays
Danville, Kentucky

COMMONWEALTH OF KENTUCKY
50TH JUDICIAL DISTRICT

BOYLE CIRCUIT COURT

Civil Action No. 94-CI-00278

CITY OF DANVILLE, KENTUCKY, - - - - - - *Plaintiff,*

v.

KENTUCKY RIVER AUTHORITY, - - - - - *Defendant.*

OPINION AND ORDER

This cause is before the Court pursuant to a Complaint for Declaration of Rights filed by the Plaintiff, City of Danville, Kentucky, (Danville). The Defendant is the Kentucky River Authority (KRA).

Danville is a Kentucky Municipal Corporation of the third class located in Boyle County, Kentucky. KRA is an agency of the Commonwealth of Kentucky created by the Kentucky General Assembly pursuant to KRS 151.700, et seq. Danville challenges the constitutionality of KRA, KRS 151.700 - 151.730 and any and all regulations promulgated therefrom. KRA has imposed a fee upon all entities drawing water from the Kentucky River basin. This includes Danville. The fees imposed by KRA, if they can be sustained at all, must be sustained as user fees and not as a tax. To impose fees based on local improvements for the benefit of the public at large upon a select group of individuals, is not taxation but confiscation. 14 Eugene McQuillan, *The Law of Municipal Corporations* Sec. 38.02 (1987 rev. 3rd ed.). In order for user fees to be sustained, there must be a reasonable relationship between the amount of money extracted and the benefit conferred. *Norwood v.* Baker, 172 U.S. 269, 19 S.Ct. 1987, 43 L. Ed. 443 (1898); *Barfield* v. *Gleason*, Ky., 63 S.W. 964 (1901); *Casey* v. *Richland County Council*, 320 S.E. 2d 442 (S.C.

1984). Where no benefit is conferred, the user fees violate the constitutional constraints of due process of law, equal protection and the taking of property without just compensation.

KRA plans to provide benefits to Danville. Danville draws its water from Herrington Lake. KRA claims they will provide information and do studies of the quality of the water in Herrington Lake. The Natural Resources and Environmental Protection Cabinet, Division of Water, has already contracted with the U.S. Environmental Protection Agency to study the water quality in Lake Herrington specifically with regard to phosphorus concentration. Taste and odor is not a problem for Danville. There is no algae problem and thus no need for a charcoal filtration system. KRA provides no benefit for Danville under any plan of study of water quality.

KRA further claims they will provide services to discover leaks in the water systems of Danville. Danville's water line is already better than the subscribed limits that KRA finds acceptable. Further, Danville is already a member of the Kentucky Rural Water Association which provides a service of water leak detection for no more charges than are presently paid by Danville. KRA also provides training and education. All of the above comes for the sum of $300.00 per year.

KRA further claims they will provide information and instruction concerning a commercial/industrial retrofit audit program. This would be helpful if Danville had a water usage problem. Danville has no water usage problem and in fact, uses only 40% of capacity for water usage.

KRA further indicates that they will provide tourism assistance for recreational use at Herrington Lake. Tourism in Frankfort already takes care of and addresses the recreational needs of Herrington Lake.

KRA further indicates that they will provide continuing education concerning conservation of our precious resource of water. Danville is already deeply involved in an extensive education program concerning conservation.

After examining all the benefits KRA claims they may provide Danville, the bottom line is Danville has already covered those areas and there is no resulting benefit from the money extracted pursuant to this user fee.

Because no benefit is conferred upon Danville by the KRA then the fees charged are unconstitutional and in violation of due process of law and equal protection by taking property without just compensation.

Not dispositive of the issue, but as interesting aside, KRS 151.700 - 151.730 has been amended and the Commonwealth of Kentucky is no longer required to acquire ownership of the locks and dams on the Kentucky River as a prerequisite to the functioning of the Kentucky River Authority.

Of great concern to this Court and greater concern to the legal community as a whole, is the amendment of statutes through the budget bill by the legislature. Statutes limiting the ability of the legislature to amend Kentucky Revised Statutes in the budget bill have now been repealed. See the old KRS 446.085 (repealed effective July 15, 1994) and the old KRS 48.310 (amended in 1990). The Kentucky Supreme Court has affirmed the ability of the legislature to amend statutes in the budget bill in *Commonwealth ex rel Armstrong* v. Collins, Ky., 709 S.W.2d 437 (1986).

The problem created by this process is the budget bill is not published and disseminated to the practicing bar as a whole. Further, there are no notations explaining such danger in by the budget bill other than a notation under the affected section of the statute indicating it was addressed in that budget bill. Because attorneys have no ready access to the budget bill this seems to set a dangerous precedent of changing the law without sufficient notification, or education of those charged to interpret this for the public as a whole. It seems in these days of distrust of systems by the public, our legislature and our court system permitting such a hidden methodology for the amendment and change of the laws of the Commonwealth of Kentucky may contribute to and justify such cynicism. The detriments of this system seem to outweigh any benefits.

WHEREFORE, IT IS HEREBY ORDERED the City of Danville receives no benefit from the fees collected by the Kentucky River Authority and consequently, the Kentucky River Authority is constitutionally precluded from collecting such fees from the City of Danville.

Given under my hand this 9th day of December, 1994.

/S/ Stephen M. Shewmaker
Stephen M. Shewmaker
Circuit Judge

[EXCERPTS FROM KENTUCKY RIVER AUTHORITY]

151.700 Declaration of Policy

(1) The general assembly declares that based upon an implied contract between the Commonwealth and the U.S. government through the secretary of the U.S. army and his predecessors, the validity of which is evidenced by over one hundred (100) years of performance by the federal government, it is the responsibility of the U.S. Army Corps of Engineers, and the U. S. Congress to operate and maintain the locks and dams on the Kentucky River and therefore urges the congress and the corps to provide the funds necessary to properly maintain the locks and dams, the condition of which the general assembly finds is deteriorating.

(2) The general assembly recognizes the historic importance of the Kentucky River locks and dams in providing a source of clean water supply for several hundred thousand citizens of the Commonwealth. Therefore, if the congress and the corps fail to fulfill their responsibility for the Kentucky River locks and dams as stated in subsection (1) of this section and the Commonwealth thereby must assume ownership of the locks and dams, it shall be the public policy of the Commonwealth to protect the health and welfare of the citizens dependent upon this system of locks and dams for their source of clean water, and to that end, the Commonwealth shall provide for the proper maintenance of the Kentucky River locks and dams through the Kentucky River Authority. It shall be the public policy of the Commonwealth that should the U.S. Army Corps of Engineers and the United States Congress fail to fulfill their responsibility to maintain and operate the Kentucky River locks and dams, and should all efforts on the part of the Commonwealth fail to force the corps and congress to fulfill their responsibility, then the Commonwealth shall assume ownership of all U.S. Army Corps of Engineers property, both real and personal, on or adjacent to the Kentucky River after ninety (90) days from the date on which the corps obtains final authority to dispose of such

property. During that ninety (90) day period, the Commonwealth shall publish legal notice of its intention to assume ownership of the property.

HISTORY: 1988 c 295, § 1, eff. 7-:15-88

1986 c 383, § 1

151.710 Kentucky River Authority

(1) The Governor shall appoint members to the Kentucky River Authority, created to carry out the essential public purpose of protecting the health and welfare of the people of the Commonwealth as declared in KRS 151.700.

(2) The Governor shall appoint the secretary of the Natural Resources and Environmental Protection Cabinet and ten (10) other persons as the members of the authority. The secretary may designate an alternate. Of the ten (10) persons, one (1) shall be a registered engineer, on (1) an expert in water quality, one (1) a mayor, and one (1) a county judge/executive. The mayor and the county judge/executive shall be officers from counties which obtain the major portion of their water supply from the Kentucky River. Five (5) members shall reside in a county adjacent to the main stem of the Kentucky River, one (1) of the five (5) members residing in counties adjacent to locks and dams one (1) through four (4); and one (1) member shall reside in a county adjacent to either the North Fork, Middle Fork, or South Fork of the Kentucky River.

(3) Of the ten (10) members first appointed, two (2) shall continue in office for terms of one (1) year, two (2) for terms of two (2) years, three (3) for terms of three (3) years, and three (3) for terms of four (4) years, as the Governor designates, At the expiration of the original terms and for all succeeding terms, the Governor shall appoint a successor to the authority for a term of four

(4) years in each case. Members may be reappointed. A vacancy in an unexpired term shall be filled for the unexpired portion of the term in the same manner as the original appointment to that term.

(4) Each member shall receive as compensation one hundred dollars ($100) per day for attending a meeting of the authority.

(5) Any member who misses three (3) consecutive meetings of the authority shall be deemed to have vacated the office. The authority shall declare the office vacant and the office shall be filled as provided by subsections (2) and (3) of this section.

(6) The authority annually shall elect one (1) of its members as chairman. A quorum for the transaction of business shall be six (6) members, and a majority of the members present at a meeting may take action on any matter legally before the authority.

(7) Members shall be paid their necessary travel expenses incurred in attending meetings and in the performance of their official duties, in addition to the per diem compensation of one hundred dollars ($100).

(8) The authority shall meet at least quarterly, and may meet upon the call of the chairman.

(9) The chairman shall be paid necessary travel expenses and a one hundred dollar ($100) per diem compensation for conducting official business of the authority.

(10) The authority shall be attached for administrative purposes to the Natural Resources and Environmental Protection Cabinet, and the cabinet shall provide the necessary personnel to provide administrative services for the authority.

(11) The necessary travel expenses and per diem compensation of the members of the authority in attending meetings and in the performance of their official duties shall be paid by the authority.

(12) The authority shall promulgate administrative regulations necessary to carry out its duties, and shall report annually to the Governor and the Legislative Research Commission.

HISTORY: 1996 c 229, § 1, eff. 7-15-96

1990 c 500, § 1, eff. 7-13-90; 1986 c 383, § 2

151.720 Powers of authority

The Kentucky River Authority is authorized and empowered to:

(1) Construct, reconstruct, provide for the major maintenance, or repair the locks and dams on the Kentucky River and all real and personal property pertaining thereto, as well as maintain the channel;

(2) Acquire by purchase, exercise of the rights of eminent domain, grant, gift, devise, or otherwise, the fee simple title to or any acceptable lesser interest in any real or personal property and by lease or other conveyance, contract for the right to use and occupy any real of personal property selected in the discretion of the authority as constituting necessary, desirable, or acceptable sites to fulfill its statutory authority and power;

(3) Lease its real or personal property to other state agencies, political subdivisions of the Commonwealth, corporations, partnerships, associations, foundations, or persons as the authority deems necessary to carry out the purposes of this section;

(4) Sell or otherwise dispose of its real or personal property in accordance with KRS 56.463 and 45A.045;

(5) Collect water use fees from all facilities using water from the Kentucky River basin, except those facilities using water primarily for agricultural purposes. Facilities charged such a fee may pass on all or any part of the fee;

(6) Issue revenue bonds in accordance with KRS 151.730;

(7) Employ persons to carry out the authority's responsibilities with revenue from the water use fees, including an executive defector who shall serve at the pleasure of the authority;

(8) Contract for services with other state agencies, political subdivisions of the Commonwealth, corporations, partnerships, associations, foundations, or persons to perform its duties;

(9) Promulgate administrative regulations providing for clean water, which shall not be less stringent than the state and federal regulations for clean water;

(10) Exercise all other powers necessary to perform its public purpose to implement and enforce the plans developed by the authority pursuant to this section, and to enforce administrative regulations promulgated by the authority. The long-range water resource plan and drought response plan shall be implemented for the basin upon the direction of the authority;

(11) Develop comprehensive plans for the management of the Kentucky River within the basin, including a long-range water resource plan and a drought response plan. Each county within the basin shall develop a long-range water resource plan and submit it to the authority. The authority shall develop a unified long-range water resource plan for the basin. The authority shall conduct a public hearing on the plan, and submit its final unified plan for the basin to the Natural Resources and Environmental Protection Cabinet. The cabinet shall act upon the plan within six (6) months and shall approve the plan, unless it objects for good reason shown. A drought response plan for the basin shall be developed by the authority, and this plan shall be implemented for the basin upon the direction of the authority;

(12) Develop and promote a plan for the protection and use of groundwater within the basin. Administrative regulations may be promulgated implementing the plan, and these regulations shall not be less stringent than state and federal regulations protecting groundwater;

(13) Develop recreational areas within the basin. These recreational areas may be operated and funded by the state Department of Parks, Kentucky State Nature Preserves Commission, or other governmental entity as specifically authorized or permitted within the biennial executive budget. There is hereby created the Kentucky River Park to be located as determined by the authority;

(14) Utilize funds provided for recreational purposes the biennial executive budget for major or minor maintenance if the authority certifies to the secretary of the Finance and Administration Cabinet that a significant need exists for the repairs and no other funds are available for the maintenance;

(15) Coordinate the Kentucky River basin water resources activities among state agencies;

(16) Report quarterly on all of its activities to the legislative Committee on Appropriations and Revenue;

(17) Receive reports from state agencies on litigation concerning the Kentucky River, which agencies are hereby directed to report to the authority;

(18) Credit to the authority any income derived from the interest earned on the investment of the water use fees collected, which shall be available for the authority's expenditure; and

(19) Accomplish the watershed management mission of the authority, which is to fulfill the provisions of this section for the Kentucky River basin, the boundary of which shall be defined by a hydrologic map promulgated in an administrative regulation.

HISTORY: 1996 c 229, § 2, eff. 7-15-96

1992 c 453, § 1, eff. 7-14-92; 1990 c 500, § 2 c 496, § 44 ;1986 c 383, § 3

151.723 Water use fees

(1) The rate of the water use fees collected by the authority shall be set for each year of the biennium based upon a total amount of funds necessary to carry out only those functions, projects, and expenses authorized by the General Assembly in the authority's biennial budget.

(2) At the time the authority submits its budget to the Governor's Office of Policy and Management, it shall certify to the General Assembly and the secretary of the Revenue Cabinet the total amount of water use reported

for the preceding biennium by users subject to the water use fees. At least thirty (30) days prior to the effective date of the authority's budget, the secretary of the Revenue Cabinet shall establish a rate for each water use fee based upon an amount of water use projected for each year of the biennium from the amount reported, calculated to generate the amount of funds necessary to carry out the functions, projects, and expenses which have been authorized by the General Assembly. The rate shall be an amount for each one thousand (1,000) gallons of water use and shall be effective for at least one (1) year.

(3) The authority shall define by administrative regulation those uses of the Kentucky River or the waters of the Kentucky River basin subject to a water use fee. Water use fees shall not apply to facilities using water for agricultural purposes. The authority shall collect the fees on a quarterly basis and pay the collected fees into the State Treasury to the credit of a restricted rind for use by the authority.

HISTORY: 1996 c 229, §4, eff. 7-15-96

151.725 Authority's duty to bring action for penalties or injunctive relief; venue

(1) The authority shall bring an action for the recovery of penalties provided for in KRS 151.990, the payment of fees provided for in KRS 151.720, or for a restraining order, or a temporary or permanent injunction for the prevention or correction of a condition constituting or threatening to constitute a violation of the administrative regulations promulgated by the authority, the long-range water resource plan, or a drought response plan developed by the authority.

(2) All actions for penalties and injunctive relief for violations of the administrative regulations promulgated by the authority, the long-range water resource plan, or a drought response plan developed by the authority shall be brought by the authority in the:

(a) Circuit Court having jurisdiction of the defendant;

(b) Circuit Court of the county in which the condition constituting or threatening to constitute a violation of the administrative regulations of the authority, the long-range water resource plan or a drought response plan developed by the authority is occurring; or

(c) In the Franklin Circuit Court

HISTORY: 1996 c 229, § 6, eff. 7-15-96

1992 c 453, § 2, eff. 7-14-92

151.730 Revenue bonds

(1) The authority is hereby authorized to provide, at one (1) time or from time to time, for the issuance of its revenue bonds for the purpose of paying all or any part of the cost of any one (1) or more projects undertaken pursuant to KRS 151.720. The principal of and the interest on such bonds shall in each instance be payable solely from a special fund provided for the payment, with revenues derived from water use fees collected from all facilities using water from the Kentucky River basin, except those facilities using water primarily for agricultural purposes, pledged to be set aside and deposited in such special funds. The bonds of any issue may be, in one (1) or more series and any one (1) or more such series may enjoy equal or subordinate status with respect to the pledge of funds from which they are payable, shall be dated, shall bear interest, shall mature at such time or times not exceeding the thirtieth anniversary of their respective dates all as may be provided by the authority, and may be made redeemable before maturity, at the option of the authority, at such price or prices and under such terms and conditions as may be fixed by the authority prior to the issuance of the bonds. The authority shall determine the form of bonds including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places for payment of principal and interest, which

may be at any bank or trust company within or without the Commonwealth. The bonds shall be signed by the facsimile signature of the chairman of the authority, and the seal of the authority or a facsimile thereof shall be affixed thereto and attested by the manual signature of the treasurer of the authority, and any coupons attached thereto shall bear the facsimile signature of the chairman of the authority. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. All bonds issued under the provisions of this section shall have and are hereby declared to have all qualities and incidents of negotiable instruments under the uniform commercial code of the Commonwealth. The bonds may be issued in coupon or in registered form, or both, as the authority may determine, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds of any bonds registered as to both principal and interest. The authority may sell such bonds at public sale, and for such price as it may determine will best effect the purposes of KRS 151.720.

(2) The proceeds of the bonds of each issue shall be used solely for the payment of the cost of the project or projects for which such bonds shall have been issued, and shall be disbursed in such a manner and under such restrictions, if any, as the authority may provide in the proceedings authorizing the issuance of such bonds or in the trust indenture securing the same. If the proceeds of the bonds of any issue, by error of estimates or otherwise, shall be less than such cost, additional bonds may in like manner be issued to provide the amount of such deficit, and, unless otherwise provide in the proceedings authorizing the issuance of such bonds or in the trust indenture securing the same, shall be deemed to be of the same issue and shall be entitled to payment from the same fund with-

out preference or priority of the bonds first issued. If the proceeds of the bonds of any issue shall exceed such cost, the surplus shall be deposited to the credit of the sinking fund or funds for such bonds or any account or accounts therein as the authority shall have provided in the proceedings or trust indenture authorizing and securing such bonds.

(3) Prior to the preparation of definitive bonds the authority may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The authority may also provide for the replacement of any bonds which shall become mutilated or shall be destroyed or lost.

(4) The authority may issue revenue bond anticipation notes.

(5) Any holder of bonds issued under the provisions of this section or any of the coupons appertaining thereto, and the trustee under any trust indenture, except to the extent of the rights given in this section, may be restricted by such trust indenture or proceedings, may, either at law or in equity, by suit action, mandamus, or other proceedings, protect and enforce any and all rights under the laws of the Commonwealth or granted under this section or under such trust indenture or the proceedings authorizing the issuance of such bonds, and may enforce and compel the performance of all duties required by this section or by such trust indenture or proceedings to be performed by the authority or by any officer or employee thereof

(6) Revenue bonds issued under the provisions of this section shall not be a debt, liability, or obligation of the Commonwealth or any political subdivision thereof and shall not be a pledge of the faith and credit of the Commonwealth or any political subdivision thereof

(7) Revenue bonds issued by the authority shall be subject to the jurisdiction and approval of the State Property and Buildings Commission and the Capital Projects and Bond Oversight Committee and shall be subject to

review by the Office of Financial Management and Economic Analysis.

(8) The authority shall not be required to pay any taxes and assessments to the Commonwealth or any county, municipality, or other governmental subdivision of the Commonwealth upon any of its property or upon its obligations or other evidences of indebtedness pursuant to the provisions of this section, or upon any moneys, funds, revenues, or other income held or received by the authority and the bonds or notes of the authority and the income therefrom shall at all times be exempt from taxation, except for death and gift taxes and taxes of transfers.

(9) Contractual expenses to construct, reconstruct, provide for the major maintenance, or repair the Kentucky River locks and dams, or to maintain the channel, or to acquire real or personal property pertaining thereto, or to construct, reconstruct, maintain repair such property, shall be paid from the proceeds of the revenue bonds. Expenses for administrative services and necessary travel expenses and per diem compensation of authority members, shall not be paid from the proceeds of the revenue bonds. Nor shall the cabinet's cost of operating the locks be paid from the proceeds of the revenue bonds.

HISTORY:1996 c 229, §3, eff. 7-15-96

1986 c 383, §4, eff. 7-15-86

151.990 Penalties

(1) Any person, city, county, or other governmental subdivision who violates KRS 151.100 to 151.460 shall be liable to a civil penally of not more than $1,000 for said violation and in addition may be enjoined from continuing said violation. Each day upon which such violation occurs or continues shall constitute a separate offense.

(2) Any person who violates any determination, permit, administrative regulation, order, long-range water resource plan, or drought response plan of the Kentucky River Authority shall be liable for a civil penalty not to exceed the sum of one hundred dollars ($100) for each day during which the violation continues, and, in addition, may be concurrently enjoined from any violations as provided in KRS 151.725.

HISTORY: 1992 c 453, § 4, eff. 7-14-92

1966 c 23, § 38

CHAPTER I
KENTUCKY RIVER AUTHORITY

010. Definitions.

020. Administrative procedures of the authority.

030. Management of surface water and groundwater in the Kentucky River Basin.

040. Tier I water use fees.

050. Tier 11 water use fees.

420 KAR 1:010. Definitions.

RELATES TO: KRS 151.100 to 151.600, 151.700 to 151.730,151.990,223.400 to 223.460,224.70,224.73

STATUTORY AUTHORITY: KRS 151.710,151.720,151.725, 151.730

NECESSITY AND FUNCTION: KRS 151.700 through 151.730 authorize the Kentucky River Authority to manage the surface water and groundwater of the Kentucky River basin. The authority has the power and duty to develop and to implement programs relating to the locks and dams on the Kentucky River; to acquire, to sell and to lease property; to develop recreational areas; to issue revenue bonds; to assess fees for water use; to contract for services; to adopt administrative regulations protecting water in the Kentucky River basin to develop and to implement comprehensive plans for protecting the water of the Kentucky River basin; and to collaborate with the Natural Resources and Environmental Protection Cabinet and other state agencies in coordinating Kentucky River basin water resource and water quality activities. This administrative regulation establishes definitions pertaining to those powers and duties.

Section 1. Definitions. (1): Administrative services means clerical assistance provided by the cabinet in accordance with KRS 151.710(10), including secretarial and bookkeeping assistance.

(2) "Annual report" means the report the authority submits annually to the Governor and to the Legislative Research Commission pursuant to KRS 151.710(12).

(3) "Best management practices" or "BMPs" means those practices which are effective and practical structural or nonstructural methods which prevent or reduce the movement of pollutants from the land to surface water or groundwater, or which otherwise protect surface water or groundwater from potential adverse effects of land use activities such as agricultural or silvicultural activities, stormwater run-off, spills or leaks, and land application or land disposal of waste.

(4) "Cabinet" means the Natural Resources and Environmental Protection Cabinet created pursuant to KRS 224.10-010.

(5) "County long-range water resource plan" means the county long-range water resource plan submitted by a county for the authority's review pursuant to KRS 151.720(9) and 420 KAR 1:030.

(6) "Discharge" or "discharge of a pollutant" means any addition of any pollutant or combination of pollutants to surface water or groundwater of the Kentucky River basin from any point source' This includes additions of pollutants into waters of the Kentucky River basin from surface run-off which is collected or channeled by man; discharges through pipes, sewers or other conveyances whether publicly or privately owned; and discharges through pipes, sewers, or other conveyances leading into privately or publicly owned treatment works.

(7) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste into or on any land or water so that the waste or any waste constituent may enter the environment or be emitted into the air or discharged into water.

(8) "Diversion" means a nonconsumptive redirecton of all or part of the flow of a stream.

(9) "Drought response plan" means the drought response plan for the Kentucky River basin developed by the authority pursuant to KRS 151.720(9) and 420 KAR 1:030.

(10) "Effluent limitations" means any restrictions or prohibitions established by 401 KAR Chapter 5.

(11) "Fee" means a water use fee for protection of the surface water and groundwater of the Kentucky River basin, paid to the authority by persons who use that water.

(12) "Floodplain" means the normally dry area or wetland adjoining a stream or lake that is inundated during a flood event.

(13) "Floodway" means that area of a stream or watercourse necessary to carry off flood water as determined by the cabinet or by the authority.

(14) "Gross withdrawal" means the amount of water withdrawn.

(15) "Groundwater" or "ground water" means all water which fills the natural openings under the earth's surface, inducing all underground watercourses, artesian basins, reservoirs, lakes, and other bodies of water below the earth's surface.

(16) "Kentucky River Authority" or "authority" means the Kentucky River Authority created pursuant to KRS 151.710.

(17) "Kentucky River basin" or "basin" means all geographic areas of the Commonwealth contained within the watershed of the Kentucky River and its tributaries, including surface water and groundwater, and delineated as hydrologic unit code 0510020 in the document entitled "Hydrologic Unit Map- 1974, State of Kentucky", published in 1974 and reprinted in 1988, and incorporated by reference in Section 2 of this administrative regulation.

(18) "Leakage" or "leak" means the amount of water lost due to leaks in a water supply or water distribution system after it has been withdrawn by the water supplier or purchased by the water supply distributor.

(19) "Long-range water resource plan" means the water supply plan described in 401 KAR 4:220, with the additions required by 420 KAR 1:030.

(20) "Mainstream Kentucky River" means the Kentucky River, including Pool 14, which extends from the North Fork of the Kentucky River at River Mile 261.6 above the

confluence of Walkers Creek the Middle Fork of the Kentucky River at River Mile 6.0 below the confluence of Coal Branch, and the South Fork of the Kentucky River at River Mile 4.0 below the confluence of Paw Paw Creek, to River Mile 0 at the confluence with the Ohio River at Carrollton.

(21) "Map of potential sources of water pollution" means the map of potential sources of contamination described in 401 KAR 4:220, Section 6 with the addition required by 420 KAR 1-030.

(22) "Net Withdrawal" means the difference between the amount of water withdrawn for noncontact cooling water and the amount of that water discharged.

(23) "Noncontact cooling water" means surface water or groundwater withdrawn from the Kentucky River basin for the purpose of reducing the temperature of a product or equipment used in making a product, if the following conditions exist:

(a) The noncontact cooling water does not come into contact with the product;

(b) The noncontact cooling water is discharged in accordance with a Kentucky Pollutant Discharge Elimination System (KPDES) permit that identifies the water as noncontact or once-through cooling water;

(c) The noncontact cooling water is discharged in accordance with water quality standards;,

(d) The noncontact cooling water is discharged within 300 linear feet of the withdrawal point or into the same pool of water; and

(e) Net withdrawal is no greater than ten (10) percent.

(24) "Nonpoint source pollution" means pollution caused by diffuse sources, including land run-off, atmospheric deposition, or percolaton through soils and rocks.

(25) "Person" means an individual, trust firm, joint stock company, corporation (including a government corporation), partnership, association, federal agency, state agency, city, commission, political subdivision of the Commonwealth, interstate body, estate, or other entity.

(26) "Point source" means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel, or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

(27) "Pollutant" means dredged spoil, solid waste, hazardous waste, special waste, incinerator residue, sewage, sewage sludge, garbage, chemical materials, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, soil, industrial waste, municipal waste, silvicultural waste, agricultural waste, and any substance resulting from the development, processing, or recovery of any natural resource which may be discharged into water.

(28) "Project" means a project authorized by KRS 151.700 to 151.730 and approved by the authority, including staff and overhead.

(29) "Quarterly report" means the report the authority submits quarterly to the General Assembly's Committee on Appropriations and Revenue pursuant to KRS 151.720(14).

(30) "Revenue bond" or "bond" means a revenue bond described by KRS 151.720(5) and KRS 151.730.

(31) "Semipublic water supplier" means any water supply system that serves more than three (3) families, but is not a water supplier or distributor.

(32) "Seven (7) day, ten (10) year low flow" or "7Q10" means that minimum average flow which occurs for seven (7) consecutive days with a recurrence interval of ten (10) years.

(33) "Standard" or "water quality standard" means an administrative regulation adopted by the authority, or by the cabinet if the authority fails to adopt it, establishing the use to be made of a surface water or groundwater and the water quality criteria necessary to maintain and protect that use.

(34) "Stream" means a river, creek or channel, having well-defined banks, in which water flows for substantial periods of the year to drain a given area, or any lake or other body of water.

(35) "Surface waters" means those above-ground waters having well-defined banks and beds, either constantly or intermittently flowing; lakes and impounded waters; marshes and wetlands; and any subterranean waters flowing in well-defined channels and having a demonstrable hydrologic connection with the surface.

(36) "Tier I fee" means a fee:

(a) Funding watershed management projects of benefit to the entire watershed of the Kentucky River basin and funding the authority's general expenses;

(b) Set by the authority based on the authority's budget; and

(c) Paid by all persons who use surface water or groundwater of the Kentucky River basin.

(37) "Tier II fee" means a fee:

(a) Funding any project of benefit to a certain part of the Kentucky River basin;

(b) Set by the authority based on the authority's budget; and

(c) Paid by all persons who use surface water or groundwater of the Kentucky River basin and who derive a direct benefit from that project.

(38) "Transfer" means an interbasin diversion of surface-waters or groundwaters to or from the Kentucky River basin.

(39) "Unified long-range water resource plan" or "unified plan" means the unified long-range water resource plan for the Kentucky River basin developed by the authority pursuant to KRS 151.720(g) and 420 KAR 1:030.

(40) "Use" or "using", if referring to the use of water in the Kentucky River basin described in KRS 151.720(5), means the withdrawal of surface water from the Kentucky River or its tributaries, the withdrawal of groundwater

within the Kentucky River basin, the point source discharge of pollutants to the Kentucky River or its tributaries, the point source discharge of pollutants to groundwater within the Kentucky River basin, the use of surface water from the Kentucky River or its tributaries for generation of hydroelectric power, the diversion or transfer of waters in the Kentucky River basin, and the use of the Kentucky River or its tributaries for navigation or recreation. "Use" or "using" shall not apply to those facilities using water primarily for agricultural purposes.

(41) "Water" means all rivers, streams, creeks, lakes, ponds, impounding reservoirs, springs, wells, marshes and wetlands, and all other bodies of surface or underground water, natural or artificial, situated wholly or partly within or bordering upon the Kentucky River

basin.

(42) "Water conservation" means methods and applications of passive and active water savings and reuse devices, components and processes to reduce demand for water supply.

(43) "Water pollution" means the alteration of the physical, thermal, chemical, biological, or radioactive properties of water in such a manner, condition, or quantity that will be detrimental to the public health or welfare, to animal or aquatic life or marine life, to the use of such waters as present or future sources of public water supply or to the use of such waters for recreational, commercial, industrial, agricultural, or other legitimate purposes.

(44) "Water resources map" means the water resources map described in 401 KAR 4:220, Section 6, and required by 420 KAR 1:030.

(45) "Water shortage emergency" means the authority's declaration that a significant number of citizens in the emergency area are served by water suppliers that are experiencing deficits in the amount of water available for use.

(46) "Water shortage response plan" means the water shortage response plan described by 401 KAR 4:220, Section 6 and required by 420 KAR 1:030.

(47) "Water shortage warning" means the authority's declaration that some water suppliers in the warning area are experiencing deficits in the amount of water available for use.

(48) "Water shortage watch" means the authority's declaration that hydrologic conditions exist in the watch area that indicate the potential for deficits in the amount of water available for use by water suppliers.

(49) "Water supplier" means any system that provides water to the public for human consumption, has at least fifteen (15) service connections or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days of the year, and withdraws more than fifty (50) percent of the water it distributes.

(50) "Water supply distributor" means any system that provides water to the public for human consumption, has at least fifteen (15) service connections or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days of the year, and depends on a water supplier to provide fifty (50) percent or more of the water it distributes.

(51) "Water supply plan" means the final plan document approved by the cabinet pursuant to KRS 151.110 through 151.118 and 401 KAR 4:220.

(52) "Water supply protection area" means the designated watershed of a surface water supply source, or the designated recharge area of a groundwater supply source, or a designated wellhead protection area.

(53) "Water supply source" means a particular site or classification of site where water is withdrawn.

(54) "Watershed" means all the area from which all drainage passes a given point downstream.

(55) "Wetlands" means land that has a predominance of hydric soils and that is inundated or saturated by sur-

face or groundwaters at a frequency and duration sufficient to support, and that under normal circumstance does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, floodplains and similar areas.

(56) "Withdraw" or "withdrawal of water" means the actual removal or taking of water from any surface waters or groundwaters of the Kentucky River basin.

Section 2. Incorporation by Reference. The document entitled "Hydrologic Unit Map - 1974, State of Kentucky", published in 1974 and reprinted in 1988, is hereby incorporated by reference. It is available for public inspection and copying, subject to copyright law, at the office of the Kentucky River Authority, 107 Mero Street, Frankfort, Kentucky 40601, between the hours of 8 a.m. and 4:30 p.m., Mondays through Fridays, excluding state holidays. (20 Ky.R.873; Am .1619; 1792; eff. 12-17-93.)

420 KAR 1:020. Administrative procedures of the authority.

RELATES TO: KRS 151.100 to 151.600,151.700 to 151.730, 151.990, 223.400 to 223.460, 224.70, 224.73

STATUTORY AUTHORITY: KRS 151.710, 151.720. 151.725, 151.730

NECESSITY AND FUNCTION: KRS 151.700 through 151.730 authorize the Kentucky River Authorize to manage the surface water and groundwater of the Kentucky River basin. The authority has the power and duty to develop and to implement programs relating to the locks and dams on the Kentucky River; to acquire, to sell and to lease property; to develop creational areas; to issue revenue bonds; to assess fees for water use; to contract for services; to adopt administrative regulations protecting waters in the Kentucky River basin to develop and to implement comprehensive plans for protecting the water of the

Kentucky River basin; and to collaborate with the Natural Resources and Environmental Protection Cabinet and other state agencies in coordinating Kentucky River basin water resource and water quality activities. This administrative regulation establishes administrative procedures employed by the authority in implementing those powers and duties.

Section 1. Election of Vice-chairman. In addition to electing a chairman as provided by KRS 151.710(6), the authority shall elect one (1) of its members as vice-chairman. The vice-chairman may act for the authority in the absence or unavailability of the chairman.

Section 2. Meetings of the Authority. Meetings of the authority shall be conducted in accordance with the Kentucky Open Meetings Law, KRS 61.805 through 61.850.

Section 3. Inspection of Public Records. (1) Public records of the authority shall be made available for public inspection in accordance with the Kentucky Open Records Act, KRS 61.870 through 61.884.

(2) The authority shall make available to a public library located in each county contained in whole or in part within the Kentucky River basin copies of the following documents:

(a) The authority's quarterly and annual reports;

(b) The authority's draft and final unified long-range water resource plans;

(c) The authority's draft and final drought response plans;

(d) The authority's letter approving a county long-range water resource plan;

(e) A county's draft and final long-range water resource plans; and

(f) The authority's administrative regulations.

Section 4. Mailing List. The authority shall maintain a list of members of the public, including members of the media, to whom copies of the public notices described by this administrative regulation may be provided. Any per-

son may request to be placed upon or removed from the authority's mailing list. The authority may periodically revise its list to remove the names of persons who do not respond to the authority's request to update the mailing list.

Section 5. Public Participation. (1) Scope and applicability. This section applies to the following activites:

(a) The authority's development of a drought response plan;

(b) The authority's development of a unified long-range water resource plan.

(2) Public notice.

(a) Before the authority prepares a draft drought response plan or a draft unified long-range water resource plan, it shall notify the public that it is seeking public participation in the preparation of those drafts. The authority shall notify the public by publishing a notice in the Lexington Herald-Leader and in a local newspaper serving each county located in whole or in part within the Kentucky River basin; and by mailing the notice to the county judge-executive of each county located in whole or In part within the Kentucky River basin. The notice shall schedule public meeting or a series of public meeting.

(b) After the authority prepares a draft drought response plan a draft unified long-range water resource plan, it shall notify the public by publishing a notice In the Lexington Herald-Leader and in a local newspaper serving each county located in whole or in part within the Kentucky River basin; and by mailing the notice to the county judge-executive of each county located in whole or In part within the Kentucky River basin. The public notice shall comply with KRS 424.130, shall state that a draft drought response plan or a draft unified long-range water resource plan has been prepared, that copies are available for inspection in accordance with the Kentucky Open Records Act,

that copies have been delivered to local libraries, and that the public shall have thirty (30) days from the date of newspaper publication to comment and to request a public hearing.

(3) Public meeting. The authority shall hold a public meeting or a series of public meetings prior to preparing a draft drought response plan or a draft unified long-range water resource plan.

(4) Public comment period. There shall be thirty (30) days from the data set in the newspaper publication pursuant to KRS 424.130 for the public to comment upon a draft drought response plan or a draft unified long-range water resource plan.

(5) Public hearing. If requested within the first fifteen (15) days of the thirty (30) day public comment period described in subsection (4) of this section, the authority shall conduct a public hearing before the close of the public comment period on the draft drought response plan or the draft unified long-range water resource plan. The public hearing shall be conducted in Frankfort unless the authority determines it Is more appropriate to hold the public hearing in another county located within the Kentucky River basin. Any person may appear at the public hearing and offer written or oral comments. The authority may limit oral testimony to five (5) minutes or less per speaker.

(6) Consideration of public comments. The authority shall consider all oral and written comments received during the public comment period described in subsecton (4) of this section. The authority may prepare a written response to those oral and written comments, and may disseminate copies of the response to commentors and to others requesting copies.

(7) Final action. The authority shall not take final action on a draft drought response plan or a draft unified long-range water supply plan until it has completed its consideration of all public comments. The authority shall publish notice that it has taken final action by publishing

a notice in the Lexington Herald-Leader and in a local newspaper serving each county located in whole or in part within the Kentucky River basin, and by mailing the notice to the county judge-executive of each county located in whole or in part within the Kentucky River basin.

Section 6. Advisory Committees. (1) The authority may appoint advisory committees to assist and to advise the authority.

(2) In appointing advisory committees, the authority shall consider appointing representatives of the public, representatives of federal, state, county or municipal governments; representatives of water resource and water quality agencies; representatives of water-using industries; representatives of water utilities, representatives of groups interested in water-related issues;and representatives of labor and argiculture.

(3) Any person who wishes to serve on an advisory committee may contact the authority in writing and so request.The authority shall consider each request

Section 7. Request for Authority Action.(1) Any person may request that the authority consider any matter whhin its jurisdiction.The request shall be made In writing to the chairman of the authority and shall be submitted at least thirty (30) days in advance of a meeting of the authority in order to be considered at that meeting.

(2) The chairman shall notify the remaining members of the authority of the request for considerabon of the matter prior to the next meeting of tho authority.

(3) The person making the request for consideration of a matter may appear before the authority at the next meeting and discuss that matter. The authority may limit the time spent on that person's presentation or in consideration of the matter.

(4) The authority may take final action at that meeting, defer final, action to a later meeting, or decline to consider the matter.(20Ky.R.877;Am.1794;eff 12-17-93.)

420 KAR 1:030.Management of surface water and groundwater in the Kentucky River basin.

RELATES TO: KRS 151.100 to 151.600, 151.700 to 151.730, 151.990, 223.400 to 223.460, 224.70, 224.73

STATUTORY AUTHORITY: KRS 151.710, 151.720, 151.725, 151.730

NECESSITY AND FUNCTION: KRS 151.700 through 151.730 authorize the Kentucky River Authority to manage the surface water and groundwater of the Kentucky River basin. The authority has the power and duty to develop and to implement programs relating to the locks and dams on the Kentucky River; to acquire, to sell and to lease property; to develop recreational areas; to issue revenue bonds; to assess fees for water use; to contract for services; to adopt administrative regulations protecting water in the Kentucky River basin; to develop and to implement comprehensive plans for protecting the water of the Kentucky River basin; and to collaborate with the Natural Resources and Environmental Protection Cabinet and other state agencies in coordinating Kentucky River basin water resource and water quality activities. This administrative regulation explains certain powers and duties and imposes certain requirements relating to management of surface water and groundwater in the Kentucky River basin.

Section 1 .Scope and Applicability. (1) Purpose. It shall be the purpose of this administrative regulation to manage the surface water and groundwater of the Kentucky River basin.

(2) Compatibility. The authority's administrative regulations set forth in this chapter shall be interpreted to be compatible with the statutes and administrative regulations administered by the cabinet.

Section 2. Collection and Dissemination of Information. The authority may conduct research, collect and interpret data, assemble a data base, and disseminate reports on water management issues. Those water management issues include:

(1) The relationship of water to other natural resources;

(2) Wastewater treatment technology;

(3) Groundwater movement and other hydrogeologic conditions;

(4) The relationship between water price and water demand;

(5) Hydrologic conditions;

(6) Groundwater and surface water quality;

(7) Water use;

(8) Water resource planning needs;

(9) Conservation and development issues;

(10) Allocation of water resources;

(11) Management, including operation, maintenance and replacement of locks and dams; and

(12) Social, economic, demographic and political issues affecting water resources.

Section 3. County Long-range Water Resource Plans. (1) Scope. Each county located in whole or in part within the Kentucky River basin shall develop and submit to the authority a long-range water resource plan.

(2) Contents of the plan. Each long-range water resource plan shall include the following:

(a) A water supply plan;

(b) A water shortage response plan for each water supplier and water supply distributor in the county that uses water withdrawn from the Kentucky River basin or serves customers in the Kentucky River

(c) A water resources map providing coverage for the portions of the county that lie within the Kentucky River basin; and

(d) A map of all potential sources of water pollution for the portions of the county that lie within the Kentucky River basin, including potential sources of water pollution affecting the water supply protection

area of a water supplier, if the authority is able to provide the funding necessary for creating the map.

(3) Deadline for submitting the plan. Each county shall submit to the authority its long-range water resource plan within thirty (30) days after the county obtains the cabinets approval of its water supply plan.

Section 4. Unified Long-range Water Resource Plan. The authority shall prepare a unified long-range water resource plan for the Kentucky River basin, which shall at a minimum address the following:

(1) Physical, chemical and biological conditions existing in the surface water and groundwater of the Kentucky River basin;

(2) The construction, acquisition, operation and control of projects and facilities for the storage and release of water;

(3) The regulation of flows and allocation of supplies of surface water and groundwater within the basin;

(4) Protection of public health;

(5) Means of controlling surface water and groundwater quality;

(6) Economic development;

(7) Improvement of fisheries;

(8) Development of recreational opportunities and recreational areas;

(9) Abatement of water pollution;

(10) The design, construction, operation and maintenance of projects and facilities for floodplain protection and flood damage reduction;

(11) Control of run-off, erosion, and agricultural and urban nonpoint source pollution;

(12) Stormwater management,

(13) Encouragement and promotion of soil conservation, land reclamation and land management to prevent and to control erosion and to improve water quality;

(14) The use of water within the basin for the generation of hydroelectric power;

(15) Control of withdrawals and diversions of surface water and groundwater;

(16) Commercial and recreational navigation on the Kentucky River;

(17) Acquisition and utilization of the Kentucky River lock and dam system;

(18) The relationship of county long-range water resource plans to the authority's unified long-range water resource plan;

(19) The need for basin-wide and specific local land and water conservation measures and practices; and

(20) Any approval criteria established by the cabinet.

Section (5)Drought Response Plan. (1) The authority shall prepare a drought response plan for the Kentucky River basin, which shall at a minimum address the following:

(a) Identification of those flow rates in the mainstream Kentucky River at which the authority would declare a water shortage watch, a water shortage warning or a water shortage emergency for persons using the mainstream Kentucky River as a water supply source;

(b) Identification of criteria for declaring a water shortage watch, a water shortage warning, or a water shortage emergency for water suppliers and other persons using water in the Kentucky River basin who do not use the mainstream Kentucky River as a water supply source;

(c) Development of a methodology for equitably reducing withdrawals, diversions or transfers from the mainstream Kentucky River and for using the locks or other devices to manipulate flows and water stored in the dams on the mainstream Kentucky River;

(d) Identification of alternatives for emergency public water supplies, such as large springs or interbasin transfers; and

(e) Inclusion of any approval criteria established by the cabinet.

(2) The authority may declare a water supply watch, a water supply warning, or a water supply emergency for all or a portion of the Kentucky River basin if conditions cause an actual or threatened shortage of water supply sources within the Kentucky River basin. The authority shall base its declaration on its drought response plan. The declaration shall identify the area affected and the types of water supply sources affected. The authority shall consult the cabinet before declaring a water supply emergency. The authority may request that the governor declare a water emergency as provided by KRS 151.200.

Section 6. Review of Applications for Cabinet Permits. While the cabinet is reviewing applications for permits, the authority may also review those applications and may offer to the cabinet comments on whether those permit applications comply with the requirements of KRS 151.700 through 151.730 and this chapter.

Section 7. Leak Detection Program. The authority may administer a leak detection program for water suppliers and water supply distributors in the Kentucky River basin.

(1) Eligibility shall be based on such factors as:

(a) Size of the service area;

(b) Suspected extent of leakage;

(c) Number of customers; and

(d) Ability to pay for a leak detection program without financial assistance.

(2) The authority may pay up to 100 percent of the cost of a leak detection program for a water supplier or a water supply distributor. (20 Ky. R.879; eff. 12-17-93.)

420 KAR 1:040. Tier I water use fees.

RELATES TO: KRS 151.100 to 151.600,151.700 to 151.730, 151.990, 223.400 to 223.460, 224.70, 224.73

STATUTORY AUTHORITY: KRS 151.710, 151.720, 151.725, 151.730

NECESSITY AND FUNCTION: KRS 151.700 through 151.730 authorize the Kentucky River Authority to manage the surface water and groundwater of the Kentucky River basin. The authority has the power and duty to develop and to implement programs relating to the locks and dams on the Kentucky River; to acquire, to sell and to lease property; to develop recreational areas; to issue revenue bonds; to assess fees for water use; to contract for services; to adopt administrative regulations protecting water in the Kentucky River basin; to develop and to implement comprehensive, plans for protecting the water of the Kentucky River basin; and to collaborate with the Natural Resources and Environmental Protection Cabinet and other state agencies in coordinating Kentucky River basin water resource and water quality activities. This administrative regulation establishes Tier I water use fees.

Section 1. Purpose. This administrative regulation establishes Tier I fees and incidental charges for the withdrawal of surface water and groundwater from the Kentucky River basin.

Section 2. Persons Required to Pay Tier I Fee. The persons identified in this section of this administrative regulation shall pay to the authority the Tier I fee and incidental charges established by this administrative regulation, unless exempted by Section 3 of this administrative regulation.

(1) A person who withdraws surface water or groundwater from the Kentucky River basin for noncontact cooling water shall pay a Tier I fee based on net withdrawal, which shall be 1 50 percent of the Tier I fee for gross withdrawal.

(2) Unless entitled to a fee based on net withdrawal in accordance with subsection (1) of this section, a person

who withdraws surface water or groundwater from the Kentucky River basin shall pay a Tier I fee based on gross withdrawal.

Section 3. Persons Exempted from Paying Tier I Fee. The following persons are exempted from paying the Tier I fees and incidental charges established by this administrative regulation:

(1) A person who withdraws surface water or groundwater from the Kentucky River basin primarily for agricultural use; and

(2) A person whose gross withdrawal of surface water or groundwater from the Kentucky River basin is less than 10,000 gallons per day.

Section 4. Tier I Fee Rates. (1) The Tier I fee for gross withdrawal shall be $0.028 per 1000 gallons and any portion thereof from the effective date of this administrative regulation through June 151.720. The Tier I fee for gross withdrawal shall be $0.022 per 1,000 gallons and any portion thereof from July 1,1995 through June 30,1996.

(2) The Tier I fee for net withdrawal shall be $0.028 per 1000 gallons or any portion thereof, multiplied by one and five-tenths (15), from the effective date of this administrative regulation through June 151.720. The Tier I fee for not withdrawal shall be $0.022 per 1000 gallons and any portion thereof, multiplied by one and five-tenths (15), from July 1,1995 through June 30,1996.

(3) The Tier I fees may be amended as necessary to fund the Tier I projects budgeted by the authority, the authority shall submit to the General Assembly with its budget request a fee structure necessary to fund those Tier I projects. The authority shall set the amended fees based on the approved budget

(4) Charges incidental to Tier I fees. The authority may assess a person required to pay a Tier I fee the following charges incidental to collection of that fee:

(a) A deposit of up to three (3) months estimated billings, except for bills of local governments, with

interest to accrue at six (6) percent per annum and the deposit to be returned in a year if prior payments were timely;

(b) A late payment charge of up to five (5) percent of the last quarter's bill for payments that are twenty (20) days late or, for local governments, more than ten (10) days after the last regular meeting of local government, whichever is later;

(c) A returned check charge of fifteen (15) dollars; and

(d) A field collection charge, with a minimum charge of fifty (50) dollars and a maximum charge of $500.

Section 5. Collection of Fees. (1) A person required by this administrative regulation to pay a Tier I fee shall pay that fee quarterly, and shall pay any charge incidental to the Tier I fee upon the authority's request. Payment shall be made within ten (10) days of receipt of a bill from the authority.

(2) Fees and incidental charges shall be paid by check or money order, and made payable to the Kentucky State Treasurer. The authority may require a check to be certified if any previous check to the authority has been returned for insufficient funds.

(3) A person paying a Tier I fee for gross or net withdrawal shall complete and submit to the authority the water withdrawal reporting form incorporated by reference in Section 6 of this administrative regulation, identifying the number of gallons withdrawn during that quarter. A person paying a Tier I fee for net withdrawal shall also complete and submit to the authority the water discharge reporting form incorporated by reference in Section 7 of this administrative regulation, identifying the number of gallons discharged. The water withdrawal and discharge reporting forms shall be submitted within fifteen (15) calendar days after the end of the quarter. A person paying a Tier I fee may use the water withdrawal reporting form required by KRS 151.160 and 401 KAR 4:010 in lieu of the

water withdrawal reporting form incorporated by reference in Section 6 of this administrative regulation.

Section 6. Incorporation by Reference of Water Withdrawal Reporting Form. The document entitled 'Water Withdrawal Reporting Form' is hereby incorporated by reference. The effective date shall be the effective date of this administrative regulation. It is available for public inspection and copying, subject to copyright law, at the office of the Kentucky River Authority, 107 Moro Street, Frankfort Kentucky 40601, between the hours of 8 a.m. and 4:30 p.m. Mondays through Fridays, excluding state holidays.

Section 7. Incorporation by Reference of Water Discharge Reporting Form. The document entitled'Water Discharge Reportng Form" is hereby incorporated by reference. The effective date shall be the effective date of this administrative regulation. It is available for public inspection and copying, subject to copyright law, at the office of the Kentucky River Authority, 107 Mero Street, Frankfort, Kentucky 40601, between the hours of 8 a.m. and 4:30 p.m., Mondays through Fridays, excluding state holidays. (20 Ky. R.881; Am. 1621; eff. 1217-93.)

420 KAR 1-050. Tier 11 water use fees.

RELATES TO: KRS 151.100 to 151.600,151.700 to 151.730, 151.990, 223.400 to 223.460, 224.70, 224.73

STATUTORY AUTHORITY: KRS 151.710, 151.720, 151.725, 151.730

NECESSITY AND FUNCTION: KRS 151.700 through 151.730 authorize the Kentucky River Authority to manage the surface water and groundwater of the Kentucky River basin. The authority has the power and duty to develop and to implement programs relating to the locks and dams on the Kentucky River; to acquire, to sell and to lease property; to develop recreational areas; to issue revenue bonds; to assess fees for water use; to contract for services; to adopt administrative regulations protecting water in the Kentucky River basin; to develop and to implement comprehensive plans for protecting the water of the

Kentucky River basin; and to collaborate with the Natural Resources and Environmental Protection Cabinet and other state agencies in coordinating Kentucky River basin water resource and water quality activities. This administrative regulation establishes Tier 11 water use fees.

Section 1. Purpose. This administrative regulation establishes Tier 11 fees and incidental charges for the withdrawal of surface water from the main stem of the Kentucky River.

Section 2. Persons Required to Pay Tier 11 Fees. The persons identified in this section of this administrative regulation shall pay to the authority the Tier 11 fees and incidental charges established by this administrative regulation, unless exempted by Section 3 of this administrative regulation.

(1) A person who withdraws surface water from the mainstem of the Kentucky River downstream of lock and dam 14 for noncontact cooling water shall pay a Tier 11 fee based on net withdrawal, which shall be 150 percent of the Tier 11 fee for gross withdrawn.

(2) Unless entitled to a fee based on not withdrawal in accordance with subsection (1) of this section, a person who withdraws surface water from the main stem of the Kentucky River downstream of lock and dam 14 shall pay a Tier 11 fee based on gross withdrawal.

Section 3. Persons Exempted from Paying Tier 11 Fees. The following persons are exempted from paying the Tier 11 fees and incidental charges established by this administrative regulation:

(1) A person who withdraws surface water from the main stem of the Kentucky River downstream of lock and dam 14 primarily for agricultural use; and

(2) A person whose gross withdrawal of surface water from the main stem of the Kentucky River downstream of lock and dam 14 is less than 10,000 gallons per day.

Section 4. Tier 11 Fee Rates. (1) The Tier 11 fee for gross withdrawal shall be $0.016 per 1 000 gallons and

any portion thereof, from the effective date of this administrative regulation through retirement of any revenue bond for which the Tier 11 fee provides debt service.

(2) The Tier 11 fee for net withdrawal shall be $0.016 per 1000 gallons and any portion thereof, multiplied by one and five-tenths (15), from the effective date of this administrative regulation through retirement of any revenue bond for which the Tier 11 fee provides debt service.

(3) The Tier 11 fees may be amended as necessary to fund the Tier 11 projects budgeted by the authority. The authority shall submit to the General Assembly with its budget request a fee structure necessary to fund those Tier 11 projects. The authority shall set the amended fees based on the approved budget.

(4) Charges incidental to Tier 11 fees. The authority may assess a person required to pay a Tier 11 fee the following charges incidental to collection of that fee:

(a) A deposit of up to three (3) months estimated billings, except for bills of local governments, with interest to accrue at six (6) percent per annum and the deposit to be returned in a year if prior payments were timely;

(b) A late payment charge of up to five (5) percent of the last quarter's bill for payments that are twenty (20) days late or, for local governments, more than ten (10) days after the last regular meeting of local government, whichever is later;

(c) A returned check charge of fifteen (15) dollars; and

(d) A field collection charge, with a minimum charge of fifty (50) dollars and a maximum charge of $500.

Section 5. Collection of Fees. (1) A person required by this administrative regulation to pay a Tier 11 fee shall pay that fee quarterly and shall pay charges incidental to that fee upon the authority's request. Payment shall be made within ten (10) days of receipt of a bill from the authority.

(2) Fees and incidental charges shall be paid by check or money order, made payable to the Kentucky State Treasurer. The authority may require a check to be certified if a previous check to the authority was returned for insufficient funds.

(3) A person paying a Tier 11 fee for gross or net withdrawal shall complete and submit to the authority the water withdrawal reporting form incorporated by reference in Section 6 of this administrative regulation, identifying the number of gallons withdrawn during that quarter. A person paying a Tier 11 fee for net withdrawal shall also complete and submit to the authority the water discharge reporting form incorporated by reference in Section 7 of this administrative regulation, identifying the number of gallons discharged. The water withdrawal and discharge reporting forms shall be submitted within fifteen (15) calendar days after the end of the quarter. A person paying a Tier 11 fee may use the water withdrawal reporting form required by KRS 151.160 and 401 KAR 4:010 in lieu of the water withdrawal reporting form incorporated by reference in Section 6 of this administrative regulation.

Section 6. Incorporation by Reference of Water Withdrawal Reporting Form. The document entitled "Water Withdrawal Reporting Form" is hereby incorporated by reference. The effective date shall be the effective date of this administrative regulation. It is available for public inspection and copying, subject to copyright law, at the office of the Kentucky River Authority, 107 Mero Street, Frankfort, Kentucky 40601, between the hours of 8 a.m. and 4:30 p.m., Mondays through Fridays, excluding state holidays.

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Comment
User Fees in Lieu of Taxes:
Avoiding Constitutional Limitations
Laurence J. Zielke

I. Introduction

As The cost of providing government services continues to increase, municipalities are seeking methods to enhance revenue without increasing taxes. The loss of federal revenue sharing and the burgeoning federal deficit have meant that local communities must absorb a greater cost of providing government services at the local level without a corresponding increase in revenue.

One method that enables local governments to increase revenues and avoid the legal restrictions and political consequences of taxation, is through the imposition of user fees, also known as service charges, for municipal services.[1] A service fee, unlike a tax, does not have to meet the requirements and restrictions concerning municipal and state taxation set forth within the Kentucky Constitution.[2]

In 1986 the Kentucky General Assembly enacted legislation concerning user fees which provides as follows:

"User fee" means the fee or charge imposed by a local government on the user of a public service for the use of any particular service not also available from a non-government provider.[3]

User fees shall not generate revenues or profits in excess of the reasonable costs associated with providing a public service.[4]

(1) Local governments imposing user fees shall establish a special revenue account for each user fee.

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[1]Board of Educ. v. Lexington-Fayette Urban County Gov't, 691 S.W.2d 218, 221 (Ky.Ct. App. 1985).

[2]Ky Const. §§157-59, 170-75.

[3]Ky. Rev. Stat. Ann. §91A.510 (Miche-Dobbs-Merrill Supp. 1990).

[4]*Id.* at § 91A.520

(2) All user fees collected and all disbursement of such fees shall be administered according to generally accepted principles of governmental accounting.[5]

The legislation does not resolve the issue of whether a charge for services is really a user fee or a tax in disguise. This article will explain how courts determine whether a charge is a fee or a tax.

II. Taxes vs. Service Charges

The difference between a tax and a service charge is not always clear. In making this determination, a great deal of emphasis is placed on whether the service charge is ancillary to a form of regulation and whether the charge is dedicated to the cost of a particular service. In determining whether a fee is a tax or service charge, courts analyze the difference between what is a tax and what is a service charge. A "tax" is a rate or duty, levied each year for the purposes of general revenue, regardless of the direct benefit accruing to the person or property taxed.[6] Contrawise, a "service charge" is a fee for a particular service.[7] The polar star that courts look for in determining whether a charge is a service fee or a tax is whether there exists a rational basis for the charge for a specific purpose, as opposed to the charge being made for a general revenue producing measure, or in the nature of a general benefit. The general rule is that where a public entity furnishes "some form of public service for profit, or at least for compensation," these charges are not taxes.[8] The rule in Kentucky has been stated as follows: "A tax is universally defined as an enforced contribution to provide for the support of gov-

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[5]*Id.* at § 91A.530

[6]Krumpelman v. Louisville & Jefferson County Metro. Sewer Dist., 314 S.W.2d 557, 561 (Ky. 1958)

[7]Dickson v. Jefferson County Bd. of Educ., 311 Ky. 781, 225 S.W.2d 672 (1950).

[8]71 Am. Jur.2d State and Local Taxation §12 (1973).

ernment, whereas a fee is a charge for a particular service."[9]

III.User Fees Incidental to Regulation

One of the earliest examples of a user fee is the revenue collected from parking meters. A parking meter extracts a charge for the use of a public street at a particularly designated place for a specified amount of time. Parking meter revenue can produce significant funds from which municipalities can construct additional public parking facilities.

One of the first challenges to user fees resulted from a dispute over parking meters. In the case of *City of Louisville* v. *Louisville Automobile Club*,[10] plaintiffs alleged that an ordinance providing for parking meter was a method of producing revenue rather than being a proper exercise of police power.[11]

The court did not discuss the difference between user fees and taxes, but instead focused on whether the primary purpose for the installation of parking meters was to regulate the use of city streets or to create revenue. The city, in adopting the parking meter program, recited that the fee was "for the regulation and control of traffic and the streets of the City."[12] However, plaintiffs insisted that the amount of revenue would be grossly in excess of the costs of installation and maintenance of the parking meter program and, therefore, the meter fee was in the nature of producing general revenue and should be voided.[13] The court disagreed and held that, since the ordinance providing for parking meters had as its basis a regulatory scheme, the city was not compelled to have a precise formula of matching the receipts with the expenses in order for the

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[9]Long Run Baptist Assn. v. Louisville & Jefferson COunty Metro Sewer DIst., 775 S.W.2d 520, 522 (Ky. Ct. App. 1989).

[10]290 Ky. 241, 160 S.W.2d 663 (1942).

[11]*Id.* at 664.

[12]*Id.* at 665.

[13]*Id.*

parking meter program to be a proper exercise of police power as opposed to an improper imposition of a tax.[14] The court recited as follows:

> If the City has the power to regulate parking, it has the power to enact a fee of sufficient amount to cover the expenses of maintaining the regulation. . . . The courts will not seek to avoid an ordinance by nice calculations of the expense of enforcing police regulations, but will promptly arrest any clear abuse of power.[15]

Consequently, one of the early challenges of a user fee for the privilege of using streets that were ostensibly constructed with tax dollars resulted in a finding by the court that as long as a nexus existed which connected the service fee with a regulatory power, the courts would find that the fee being charged was for a service and was not a general tax revenue measure. Furthermore, the court ruled that the revenues could not be excessive to support the service.[16] This ruling has now been refined by legislation limiting user fee revenues to the reasonable costs of providing the services.[17]

IV. Charges for Use of Public Facilities

Another service charge which was attacked as a tax concerned the imposition by the Louisville and Jefferson County Metropolitan Sewer District of a fee for the use of sewers.[18]

In 1948, the Louisville and Jefferson County Metropolitan Sewer District (MSD) was created pursuant to Chap-

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[14]*Id.*

[15]*Id.* at 665 (quoting Ex Parte Duncan, 179 Okla. 355, 365, 65 P.2d 1015, 1017 (1937)).

[16]*Id.*

[17]Ky. Rev. Stat. Ann. § 91A.510 (Michie/Bobbs-Merrill Supp. 1990).

[18]See Veail v. Louisville & Jefferson County Metro. Sewer Dist., 303 Ky. 248, 197 S.W.2d 413 (1946).

ter 76 of the Kentucky Revised Statutes.[19] The custodianship of the existing drainage and sanitary sewer facilities previously owned, operated, constructed, and financed by the City of Louisville was transferred to MSD. When MSD obtained these facilities, in enacted a schedule of rates, rentals, and charges for the use of the facilities.[20] MSD began charging for sewer service which previously had been provided to users of the city sewer system as part of the city's general provision for municipal services. A taxpayer, who was previously being provided sewer service as part of his taxes, challenged the collection of sewer service charges because the sewer system had been constructed out of tax receipts.[21] The taxpayer argued that MSD's sewer service charges took private property without compensation,[22] impaired the obligation of contracts, and violated the Kentucky Constitution,[23] and that as a result, the service charges were a form of double taxation.[24] The allegation of double taxation was made because the City of Louisville, Kentucky, constructed the sewer system from tax receipts and now the Metropolitan Sewer District was charging a fee for the use of that system, and, therefore, this was a form of double taxation.[25] The court found that there was no taxation in the charging for sewer service and stated as follows:

> Undoubtedly, a great deal of money is spent annually in maintaining and operating the system; and it is entirely equitable and legal, as we have said, to charge

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[19]Ky Rev. Stat. Ann. §§ 76.010-76.200 (Michie/Bobbs-Merrill 1982).

[20]*Id.*, at § 76.090.

[21]197 S.W.2d at 416.

[22]*Id.*

[23]Ky. Const. §§ 157-159.

[24]197 S.W.2d at 418.

[25]*Id.*

[26]*Id.* at 416.

> the users of the system a reasonable rate to defray the expenses of operations, instead of directly assessing the taxpayers of the city through its general fund.[26]

In regard to the allegation of a double taxation, the court stated as follows:

> Finally, it is insisted that the Act [chapter 76 of the Kentucky Revised Statutes] is contrary in public policy, in that it authorized double taxation. We find it unnecessary to discuss the public policy of this State in respect to double taxation, since the Act provides for no tax whatever. Charges for sewer service are not taxes, any more than are bridge tolls or water rents.[27]

V. Requiring Use of a Charged Service

Service charges have been established by municipalities in providing garbage services. The City of Bowling Green, Kentucky, enacted on ordinance providing that all property owners use a municipal garbage disposal system.[28] The ordinance provided that every parcel of property would be charged a user fee for the service.[29] This ordinance used the regulatory powers over public health and safety coupled with a fee for the service.[30] In *Cassidy* v. *City of Bowling Green*,[31] a suit challenging this fee, the court held that the city was under no obligation to provide sanitation service, but if it chose to do so there was no prohibition to provide the service and require payment for the service.[32] In that case, the court held that the city could require the use of the city garbage service and could charge for the required use.[33]

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[27] *Id.* at 418.

[28] See Cassidy v. City of Bowling Green, 368 S.W.2d 318, 319 (Ky. 1963).

[29] See *id.*

[30] See *id.* at 319-20.

[31] *Id* at 318.

[32] *Id.* at 319-20.

[33] *Id.*

VI. Indicia of User Fees vs. Taxes

When construing whether a charge is a valid user fee or is a tax in disguise, the courts look to certain indicia of a tax as opposed to a service charge. One item that is reviewed is whether the service charge is incidental to a regulatory scheme supporting the charge. It was under a regulatory scheme that the parking meter fees were upheld.[34] The court found the meter program to be incidental to the proper exercise of police power.[35] Another indicia is whether the charge has as its primary purpose the raising of general revenue or whether the charge is for a specific purpose. The holding in *Teter* v. *Clark County,*[36] provides a succinct summary of how courts analyze whether a charge is valid as a service fee or whether the charge is invalid as a tax. The court in Teter stated as follows:

> The charges were only incidental to the regulatory scheme: the payments went only toward the cost of that program: none of the money went into general revenue. Thus, because the money was collected for a specific purpose (to pay the cost of a public health program) the charge was deemed valid.[37]

The service charge at issue in *Teter* concerned the charging of fees for storm and surface water drainage services.[38] The court made the distinction between service charges and taxes clearly dependent on whether the charges involved regulation by stating as follows:

> In distinguishing between a "fee" and a "tax" we stated that if charges are intended to raise money, they are actually taxes. Conversely, if the charges are prima-

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[34]City of Louisville v. Louisville Automobile Club, 290 Ky. 241, 160 S.W.2d 663 (1942).

[35]*Id.*

[36]Teter v. Clark County, 104 Wash.2d 227, 704 P.2d 1171 (1985).

[37]*Id.* at 1177.

[38]*Id.*

> rily tools of regulation, they are not taxes. Finding that the ordinances in *Hillis* clearly provided that the fees be applied to offset costs of specific services, and that the ordinances made no provision for regulations, this court held that the fees were actually taxes.[39]

A similar holding was made by the Kentucky Court of Appeals in the case of *Long Run Baptist Association* v. *Louisville and Jefferson County Metropolitan Sewer District.*[40] In *Long Run*, the Louisville and Jefferson County Metropolitan Sewer District's creation of stormwater drainage services with a concomitant service charge was upheld on the basis that the service charge was not a tax, but was a charge for services rendered by facilities of the District.[41]

In the case of *Zelinger* v. *City and County of Denver*,[42] the Supreme Court of Colorado found that a storm drainage service charge was not a tax since "the Ordinance in question does not raise revenue for general municipal purposes as a sole or principal objective."[43]

The hallmark of each of these cases is that the service charge was not for general municipal purposes, but was for a specific purpose relating to the program. Additionally, in each of the cases, there was a regulatory scheme providing for a public health or safety which accompanied the charge.

VII. Calculation of the Service Fee

Another attack on the imposition of service charges is that the precise measurement of the service is not possible and,

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[39]*Id* at 1180 (citing Hillis Homes, Inc. v. Shehomish Court 97 Wash. 2d 804, 650 P.2d 193 (1982).

[40]Long Run Baptist Ass'n. v. Louisville & Jefferson County Metro. Sewer Dist. 775 S.W. 2d 520 (Ky. Ct. App. 1989).

[41]*Id.* at 523.

[42]Zelinger v. City & County of Denver, 724 P.2d 1356 (Colo. 1986).

[43]*Id.* at 1359.

therefore, the charge is really a tax.[44] The issue of precision in matching the service charge with the expense associated with the charge was dealt with in *City of Louisville* v. *Louisville Automobile Club.*[45] It is universally held that a precise matching of the service with the expenses is not required.[46] It also is not required that the charge itself be capable of precise measurement.[47] In the case of parking meters, it is clear that one hour of service is provided for a certain fee. Less precise, but still acceptable, is the charge for sewer service based upon the consumption of water.[48] However, the courts also upheld lesser quantified services, such as drainage charges which are based upon the amount of impervious surface on a parcel of property which contributes to runoff.[49]

In *Long Run*, the plaintiff contended that, while sewers were capable of accurate measurement, stormwater services were incapable of accurate measurement, and, therefore, it was really a tax.[50] This issue was squarely addressed in *Teter* v. *Clark County*,[51] where the court stated:

Respondents are not required to *measure each* residential lot to ascertain the *exact* amount of impervious surface on

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[44]See Barber v. Commissioner, 674 S.W.2d 18 (Ky Ct. App. 1984); Board of Educ. of Fayette County v. Lexington-Fayette Urban County Gov't, 691 S.W.2d 218 Ky. Ct. App. 1986).

[45]City of Louisville v. Louisville Automobile Club, 290 Ky. 241, 160 S.W.2d 663 (1942).

[46]*Id.* at 665.

[47]Teter v. Clark County, 104 Wash. 2d 227, 704 P.2d 1171, 1179 (1985).

[48]Veail v. Louisville & Jefferson County Metro. Sewer Dist., 303 Ky. 248, 197 S.W.2d 413 (1946).

[49]Long Run Baptist Ass'n v. Louisville & Jefferson County Metro. Sewer Dist., 775 S.W.2d 520 (Ky. Ct. App. 1989).

[50]*Id.* at 522.

[51]Teter, 704 P.2d at 1171.

each one. Further, only a *practical* basis for the rates is required, not mathematical precision.[52]

The Kentucky Court of Appeals in *Long Run* upheld the same reasoning.[53]

VIII. Rational Relationship of the Service to the Fee

Attacks are made on service charges on the basis that the process of establishing the fee and the actual fee itself bear no relationship to the service. Therefore the fee is arbitrary, capricious, and violates the rights of equal protection and due process.[54] However, the standard of review is one which places the burden to prove arbitrariness and capriciousness on the person attacking the charge. As the court in *Teter* stated: "To be void for unreasonableness, an ordinance or resolution must be 'clearly and plainly' unreasonable."[55]

As shown in *Long Run*, as long as a municipality establishes charges that are based upon a reasonable and rational classification, the charge will withstand attacks that it is arbitrary, capricious, or not uniform.[56] In *Long Run*, the Louisville and Jefferson County Metropolitan Sewer District established that the average amount of impervious surface on one and two-family residential properties and charged a drainage service fee for each parcel of property in the amount of $1.75 per month for services provided.[57] For all commercial and industrial property, the sewer district charged $1.75 per each 2.500 square feet of impervious surface.[58] The court found the investigations by the Louisville and Jefferson County Metropolitan Sewer District as to the amount of run-off and impervious surface to

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[52]*Id.* at 1179.

[53]775 S.W.2d at 520.

[54]*Id.*

[55]704P2d at 1178.

[56]775S.W.2d at 520.

[57]*Id* at 523.

[58]*Id.*

be rationally related to the charge.[59] Thus, the service fee was valid and not a tax.[60] As long as the service charge is uniform and there exists a rational basis for different classifications of charges, the fee will not violate section 3 of the Kentucky Constitution.[61]

IX. Collection of Service Fees

Another area which must be explored in evaluating whether a fee is a service charge or a tax is the determination of how the charges are collected and the enforcement of that collection. In the case of the sewer districts, a statute provides that water will not be provided until the sewer service charge is paid.[62] In some cases, service charges for one service may be compelled through the discontinuance of another service, such as stopping water service for the nonpayment of garbage fees. This is a very effective enforcement procedure and is lawful. In *Cassidy* v. *City of Bowling Green*,[63] the court stated:

> The final contention is that the City may not enforce collections of its garbage disposal charges by discontinuance of its water services. We are unable to grasp from appellant's brief what constitutional right is being breached by this method of collecting bills. It is shown by this record that for public health and sanitation purposes, the City furnishes water service, sewerage service, and garbage disposal service. They are all inter-related and the City is under no obligation to furnish any or all of these services except upon the payment of reasonable charges. This public health program, while divided into separate administrative units, is a single program. Any reasonable method of

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[59]*Id.*

[60]*Id.* at 523-24.

[61]*Id*

[62]Ky Rev.Stat.Ann. § 76.090(4) (Michie/Bobbs-Merrill 1980).

[63]368S.W.2d 318 (Ky. 1963).

> collection is justified and certainly deprives appellants of no constitutional rights.[64]

The Court went on to say that interdependence of the service in regard to enforcement procedures is not necessarily a controlling factor.[65]

There are situations where a municipality may attempt to have the user fee charged annually along with the tax bill. While there is no prohibition to this procedure, it may blur the distinction between the user fee and the tax. For that reason, it may be better to avoid this method of collecting user fees. Additionally, if the service fee is included on a tax bill, the collection of the charges is complicated since the sheriff is the tax collector and has no independent authority to collect service charges.[66]

X. Conclusion

The ability of municipalities to enact user fees for services provided by the municipality seems to be the growing trend and, if done properly, is enforceable, collectible, and legal.

Furthermore, the use of service fees in order to support the issuance of revenue bonds has been upheld and provides the municipality even greater latitude in providing for municipal services without resorting to taxation.[67] The court, in the case of *Skidmore* v. *City of Elizabethtown*,[68] held that the revenue from parking meters is not tax revenue and may be pledged for the payment of bonds.[69] Without the constitutional restraints relating to taxation, it is clear that user fees will be the method and means of financially supporting government services.

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[64]*Id.* at 320.

[65]*Id.*

[66]KY.Rev.Stat.Ann. §134.140 (Michie/Bobbs-Merrill Supp. 1991).

[67]White v. Common Council of Middlesboro, 414 S.W.2d569 (Ky. 1967).

[68]291 S.W.2d 3 (Ky.1956).

[69]*Id.* at 5.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

CITY OF DANVILLE, KENTUCKY - - *Petitioner*

versus

KENTUCKY RIVER AUTHORITY, Et Al. - - - - *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Statutes and regulations of the Kentucky River Authority ("the Authority") provide *inter alia* that users of the Kentucky River basin's waters shall pay water use fees which fund the Authority, its projects, and watershed management and protection programs.

The questions presented are:

1. Whether the Kentucky Court of Appeals decision upholding the Authority's water use fees is based on independent and adequate state ground thus precluding this Court's certiorari jurisdiction.
2. Whether the Authority, a legislatively created watershed management and protection agency, may lawfully impose water use fees upon the petitioner which actually withdraws from and discharges into the waters of the Kentucky River basin.
3. Whether special assessments law or the 5th and 14th Amendments are applicable to this case in lieu of the state rule of *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958).

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No. 96-1303

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

CITY OF DANVILLE, KENTUCKY - - - *Petitioner*

versus

KENTUCKY RIVER AUTHORITY,
PHILLIP J. SHEPHERD,
CHARLES W. CARR,
TOM DORMAN,
JUDGE W. NEAL CASSIDY,
DR. DONALD C. HANEY,
MARTIN HOWARD LOWRY,
EDWARD FOREE,
GREG GINTER,
THOMAS M. JONES,
RALPH E. MCCLANAHAN, and
BETTY F. WHITAKER, - - - - - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Kentucky River Authority, et al., ("the Authority") respectfully request that the petition for writ of certiorari be *denied* for the reasons set forth herein. Reasons for denial include lack of certiorari jurisdiction.

OPINIONS AND ORDERS ENTERED

1. An Order Denying Discretionary Review was entered by the Kentucky Supreme Court in *City of Danville* v. *Kentucky River Authority, et al.*, No. 96-SC-214-D, on November 13, 1996. The text is reprinted at page 1a of the petition appendix ("Pet. App.").

2. An Opinion Reversing and Remanding was entered by the Kentucky Court of Appeals in *Kentucky River Authority* v. *City of Danville*, No. 95-CA-000064-MR, on February 16, 1996. The text is reprinted at Pet. App., pages 2a through 7a. The opinion was published as *Kentucky River Authority* v. *City of Danville*, Ky. App., 932 S.W.2d 374 (1996).

3. An Order Denying Transfer was entered by the Kentucky Supreme Court in *Kentucky River Authority, et al.* v. *City of Danville*, No. 95-SC-52-T, on March 14, 1995. The text is reprinted herein at page 1a of the Respondents' Appendix ("Resp. App.").

4. An Opinion and Order was entered by the Boyle Circuit Court, in *City of Danville* v. *Kentucky River Authority, et al.*, Civil Action No. 94-CI-00278, on December 9, 1994. The text is reprinted at Pet. App., pages 8a through 11a.

JURISDICTION

The petition claims to invoke this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a). However, the writ should be denied because the Kentucky Court of Appeals decision is based on independent and adequate state ground. *Michigan* v. *Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); *International Longshoremen's Association, AFL-CIO* v. *Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986). The adequacy and independence of state law is clear from the face of the opinion. Granting a writ therefore would violate this Court's jurisdictional prohibition.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Kentucky Revised Statutes (KRS): 151.700 - 151.730 and 151.990. The approximate texts are reprinted at Pet. App., pages 12a through 23a.

2. Kentucky Administrative Regulations (KAR): 420 KAR 1:010, 420 KAR 1:020, 420 KAR 1:030, 420 KAR 1:040, and 420 KAR 1:050. The approximate texts are reprinted at Pet. App., pages 24a through 49a.

3. Kentucky Constitution § 2: *Absolute and arbitrary power denied.* - Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

4. 14th Amendment, U.S. Constitution. The approximate text is reprinted in part at page 2 of the petition.

COUNTERSTATEMENT OF THE CASE

The Kentucky River basin is a watershed which encompasses all geographic areas of the Commonwealth of Kentucky that are drained by the Kentucky River and its tributaries, including surface water and groundwater. 420 KAR 1:010 Section 1(17). The Kentucky River basin is located wholly within the state of Kentucky. The petitioner withdraws water from a major tributary of the basin, namely the Dix River at an impoundment known as Lake Herrington. Both Herrington and the Dix are waters of the Commonwealth and are part of the Kentucky River watershed. KRS 151.120(1). Also, the petitioner discharges from its waste water treatment plant into the Kentucky River basin. Thus, under the statute and the regulations, the petitioner "uses" the Kentucky River basin's waters. KRS 151.720(5); KRS 151.723; 420 KAR 1:010, Section 1(40).

Pursuant to the statutes and regulations, the Authority charges water use fees for the use of the Kentucky River basin's waters. KRS 151.720(5); 151.723; 420 KAR

1:040, Section 2. The water use fees charged to the petitioner and other water users are calculated based upon the actual quantities of water withdrawn from the basin. 420 KAR 1:040, Section 2(2). The petitioner, for example, withdraws over 3 million gallons of water daily, consumes or sells the withdrawn water, and discharges its treated waste water back into the watershed. The fee rate charged to the petitioner has been set by administrative regulation at 2.2 cents per 1,000 gallons of water withdrawn. 420 KAR 1:040, Section 4. In the previous legislative biennium state budget, the initial fee rate was 2.8 cents per 1,000 gallons. *Id.* The statute allows the petitioner to "pass on" the fees to its water customers. KRS 151.720(5).

The fees are used to fund the Authority, its projects to enhance the water supply in the basin, and for watershed protection. The fees are used for no other purpose. The Kentucky River watershed is eastern and central Kentucky's largest water resource.

Since the Authority began collecting water use fees in 1994, the petitioner has continued to resist the Authority's statutes and regulations and refuses to pay the fees. In fact, the petitioner initiated this litigation to challenge those fees. In its factual statement, the Kentucky Court of Appeals succinctly summarized this case:

> The controversy in this case arises from the Authority's interpretation of its enabling statute Ky. Rev. Stat. (KRS) 151.720, which was enacted in response to continuing problems and potential depletion of a valued natural resource, the Kentucky River. In 1990, the General Assembly enacted KRS 151.720 which mandates that the Authority protect the Kentucky River basin through watershed management. In 1993, the Authority enacted administrative regulations to implement the statutes including a two-tier fee schedule by which it charged the users of water from the river basin. Tier II fees are collected from entities with-

> drawing water directly from the main stem of the Kentucky River and are used by the Authority to finance specific capital construction projects designed to enhance the water available for the basin. Tier I fees, which Danville is designated to pay, apply to entities withdrawing water from anywhere in the basin, whether from groundwater or tributaries. These fees are used for projects benefiting the entire basin and are assessed at a uniform rate based upon use of the Kentucky River basin. They are not used for the general fund[1] but only for Kentucky River basin management.
>
> Danville withdraws no water directly from the Kentucky River but does from Lake Herrington on the Dix River which is a Kentucky River tributary. It also discharges water from its waste water treatment plant into a Kentucky River tributary.

Opinion, Pet. App., pp. 2a - 3a. In reaching its decision upholding the fees, the court followed an unbroken line of state case law which began with *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958). The court directly quoted the rule of *Curtis*:

> The fee in this case is based upon the actual use by the city of the Kentucky River water basin. Despite the city's contention that it does not need the services of the Authority, the General Assembly recognized a potential depletion of one of this state's most valued natural resources and took efforts to preserve the Kentucky River basin. The interest of the Commonwealth

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[1]The term "general fund" refers to the Commonwealth of Kentucky's treasury. The Authority is self-sustaining and wholly independent of the general fund. The water use fees collected by the Authority are placed into a restricted funds account for use only by the Authority for its watershed management and protection programs. KRS 151.723(3).

> in protecting Eastern Kentucky's largest water resource is beyond question. An adequate and clean water resource is essential to all it serves. In *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958), the court rejected the contention that a statute was unconstitutional because it conclusively presumed that all land within a designated area would benefit from a surface drainage improvement.
>
> > We think that in the case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general enhancement of conditions of health, comfort and convenience in the area and the resulting general enhancement of values in the area.
>
> *Id.* at 382.

Opinion, Pet. App., pp. 5a - 6a. Under the rule of *Curtis* the Court of Appeals reversed the local trial court which had ruled that the Authority's fees were unconstitutional as lacking in *special* benefits to the petitioner. The petitioner and the trial court believed that special benefits were required pursuant to special assessments law and due process, as in the special assessments cases of *Village of Norwood* v. *Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), *Barfield* v. *Gleason*, 111 Ky. 491, 63 S.W.2d 964 (1901), and *Casey* v. *Richland County Council*, 282 S.C. 387, 320 S.E.2d 443 (1984). The Kentucky Court of Appeals, however, rejected the notion that special benefits law applied to this water use fee case. Rather, under *Curtis* sufficient general benefit inured to the petitioner as a matter of Kentucky law. In following *Curtis* the court stated:

> Preservation of the Kentucky River basin is a benefit which obviously accrues to all within its boundaries.

> We therefore hold to be clearly erroneous the trial court's finding that no benefit to the City of Danville exists. *Yount* v. *Calvert*, Ky. App., 826 S.W.2d 833 (1992).

Opinion, Pet App., p. 6a. It is from the Kentucky Court of Appeals' application and adherence to the state rule of *Curtis* that the petitioner complains. The only federal questions determined by the court appear at the end of its opinion and relate to the petitioner's Commerce Clause and Supremacy Clause arguments. Therein the court summarily stated:

> We find no merit in Danville's contention that the Commonwealth cannot claim ownership to the waters of the Kentucky River because of the Supremacy Clause and the Commerce Clause of the United States Constitution. A state has power to control and conserve its water resources, and unless Congress expressly invokes the navigational servitude, the state has authority to control its internal waters. *City of Trenton* v. *New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); *California* v. *United States*, 438 U.S. 645, 662, 98 S.Ct. 2985, 2994, 57 L.Ed. 1018 (1978).

Opinion, Pet. App., p. 7a. These issues, however, are not raised in the petition.[2]

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[2]Pursuant to Rule 15.2, the Authority notes certain inaccuracies in the petition. For example, the statement that the Authority "agreed" that the fees are a "special 'assessment' or 'user fee' for which a commensurate or proportional benefit must be conferred" is erroneous. Pet. Br.., p. 22. Also, the Authority is not a watershed management *district*. Pet. Br., p. 4. Tier I fees are *not* merely "assessed for the purpose of funding administrative expenses." Pet. Br., p. 4. The Kentucky General Assembly determines the Authority's budget and oversees the setting of the fee rates under KRS 151.723. Pet. Br., p.5. And, the petitioner is not assessed fees "based solely on its geographic location." Pet. Br., p. 12.

Presently pending before the state trial court is the Authority's motion for entry of a judgment consistent with the Kentucky Court of Appeals opinion.

* * *

REASONS FOR DENYING THE WRIT

I. THE KENTUCKY COURT OF APPEALS DECISION IS BASED ON INDEPENDENT AND ADEQUATE STATE GROUND AND UNDER *MICHIGAN* V. *LONG* THIS COURT HAS NO CERTIORARI JURISDICTION.

As to the issues claimed by the petitioner, the Kentucky Court of Appeals decision is based on independent and adequate state substantive law.[3] The most pivotal state authority on which the decision is based is the rule of *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958), quoted above. The petitioner's claim that the court decided an "important federal question" is erroneous. Rather, the court correctly applied and followed state law.

The law is clear that where independent and adequate state ground for the decision plainly exist this Court has no jurisdiction. *Michigan* v. *Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983); *International Longshoremen's Association, AFL-CIO* v. *Davis*, 476

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[3]The petition is procedurally misdirected. Under 28 U.S.C. § 1257, the petition should not be directed to the Kentucky Supreme Court but rather to the Kentucky Court of Appeals. Moreover, the petitioner requests this Court to issue a writ to the Kentucky Supreme Court for its refusal to grant discretionary review. Such refusal is clearly not reviewable. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160, 74 S.Ct. 396, 397, 98 L.Ed. 583 (1954); *Hammerstein* v. *Superior Court of California*, 341 U.S. 491, 492, 71 S.Ct. 820, 821, 95 L.Ed. 1135 (1951).

U.S. 380, 387, 106 S.Ct. 1904, 1910, 90 L.Ed.2d 389 (1986). *See also Coleman* v. *Thompson*, 501 U.S. 722, 729-730, 111 S.Ct. 2546, 2553-2554, 1152 L.Ed.2d 640 (1991). The Kentucky Court of Appeals decision indicates clearly and expressly that the issues in the case were decided on state substantive law. Indeed, from the face of the state court opinion it is plainly clear that no federal issue as claimed in the petition played any role in the court's decision. *Cf: Kentucky* v. *Stincer*, 482 U.S. 730, 735, 107 S.Ct. 2658, 2662, n. 1, 96 L.Ed.2d 631 (1987) (certiorari granted where the 6th Amendment was expressly interwoven in the Kentucky court's decision, comparable to the presence of *Terry* v. *Ohio* and the 4th Amendment in *Michigan* v. *Long*); *New York* v. *Class*, 475 U.S. 106, 109-110, 106 S.Ct. 960, 963-964, 89 L.Ed2d 81 (1986) (certiorari granted where the state court opinion cited and discussed federal and state law and the opinion lacked the requisite "plain statement" under *Michigan* v. *Long* that the decision rested on state grounds); and *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 625, 109 S.Ct. 2037, 2049, 104 L.Ed2d 696 (1989) (certiorari granted where the Arizona court opinion focused on federal statutes and "did not divorce the state constitutional issue from the questions of federal law.")

As to the petitioner's claimed 5th and 14th Amendment issues, *no* federal law is discussed or even cited by the Kentucky Court of Appeals. Instead, the only federal law discussed in the opinion relates to the Commerce Clause and Supremacy Clause arguments by the petitioner which were summarily found to have "no merit" by the court. Opinion, Pet. App., p. 7a. Those issues, however, are *not* part of the petitioner's concerns.

The Kentucky Court of Appeals opinion is replete with references to state authority. For example, the Kentucky Court of Appeals' reliance on *Commonwealth, ex rel. Armstrong* v. *Collins*, Ky., 709 S.W.2d 437 (1986), stands

for the fundamental rule under the Kentucky constitution that the legislature is vested with the authority to amend its statutes through its appropriations power. Relying on this state rule, the court properly rejected the petitioner's claim that the legislature could not amend the Authority's statutes by using the state budget bill to specifically direct some of the water use fees toward establishment of an operational staff to carry out the Authority's duties and responsibilities.

The only other specific constitutional matters, cited by the court were Sections 27 and 28 of the Kentucky Constitution. Those sections provide that taxation is an exclusively legislative function for raising revenue for the state's general fund and cannot be undertaken by an administrative body of the executive branch of government. This state principle is echoed in *Long Run Baptist Association, Inc.* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 775 S.W.2d 520 (1989), which is cited in the court's opinion.

> Indeed, taxation is a legislative function which if delegated to MSD would violate Sections 27 and 28 of the Kentucky Constitution. Therefore, if MSD's drainage charge is determined to be a tax, it must be adjudged to be illegal.

Id., at 522. The Court of Appeals reliance on established state law principles in *Long Run* underscores the court's construction under Kentucky law that the Authority is not a legislatively created taxation district and that the Authority's fees cannot be equated with taxes.

> The fees imposed by the Authority for the purpose of fulfilling the statutory mandates cannot be equated with taxes. The funds generated from the fees are to be used for the specific purpose of conserving and controlling the waters in the Kentucky River basin and are incidental to the statute.

Opinion, Pet. App., p. 5a. An additional demonstration of the Kentucky Court of Appeals' reliance on state law is shown by the court's citations to three other Kentucky cases.

> Assessments and fees charged without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process and the constitutional prohibition against the taking of private property without just compensation. *See Skidmore* v. *City of Elizabethtown*, Ky., 291 S.W.2d 3 (1956), *Portwood* v. *Falls City Brewing Company*, Ky., 318 S.W.2d 535 (1958), and *Woolsley* v. *Big Reedy Creek Watershed*, Ky., 383 S.W.2d 135 (1964).

Opinion, Pet. App., p. 5a. These cases reflect the court's reliance on established Kentucky law that fees having a reasonable relationship to benefits received are not arbitrary and capricious and therefore not unconstitutional. Where a reasonable relationship exists, as in the case at bar, the fees do not violate equal protection, due process or the prohibition against taking private property without just compensation. Although not expressly articulated by the court's opinion, the concept of "arbitrary and capricious" is a fundamental Kentucky legal principle which is rooted in Section 2 of the Kentucky Constitution. Moreover, Section 2 "is broad enough to embrace the traditional concepts of both due process of law and equal protection." *Kentucky Milk Marketing and Antimonopoly Commission* v. *Kroger Co.*, Ky., 691 S.W.2d 893, 899 (1985). It would also appear from *Woolsley* v. *Big Reedy Creek Watershed*, *supra*, at 137, that Kentucky's highest court views the state constitution as encompassing the concept of takings.

Nevertheless it is indeed plainly clear from the Kentucky Court of Appeals decision that it is based independently and adequately on state law and does not involve the federal constitutional issues which are trumpeted by the petitioner. Nowhere in the court's decision is any fed-

eral law discussed or even referenced, except as to the Supremacy and Commerce Clause arguments which the court summarily rejected as having "no merit" and which the petitioner does not contest. Opinion, Pet. App., p. 7a. Nor are there any federal questions as claimed by the petitioner that are interwoven in the decision as they were in *Kentucky* v. *Stincer, supra, New York* v. *Class, supra,* or *ASARCO, Inc.* v. *Kadish, supra.* Nor is there any indication that the court has attempted to thwart this Court's certiorari jurisdiction by sanitizing the alleged federal issues and improperly basing its ruling only upon state law. Surely this Court should defer to the state substantive grounds of the court's decision. *See* Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 4020.

Clearly, lack of a federal question determination is fatal to certiorari jurisdiction and the writ therefore should be denied. Moreover, even if the Commerce and Supremacy Clause arguments which were rejected by the Kentucky Court of Appeals could be construed as invoking certiorari jurisdiction, the Kentucky Court of Appeals decision rests on state law ground that is nonetheless independent of the federal questions and clearly adequate to support the judgment. *See Coleman* v. *Thompson, supra,* at 729-730. Nor does this Court "review federal issues that can have no effect on the state court's judgment." *International Longshoremen's Association, AFL-CIO* v. *Davis, supra,* at 387.

II. NO COMPELLING REASONS EXIST FOR THIS COURT'S REVIEW, NO IMPORTANT FEDERAL QUESTIONS WERE DECIDED, AND NO CONFLICT IN FEDERAL LAW EXISTS.

U.S. Sup. Ct. Rule 10 states that the granting of a petition is discretionary and ordinarily will be granted only for compelling reasons. However, there certainly are *no compelling reasons* in this case. With respect to the issues claimed by the petition, no important federal questions

were decided by the Kentucky Court of Appeals. Rather, state substantive law was construed, applied and followed by the Kentucky Court of Appeals decision.

Not only does the Kentucky Court of Appeals decision lack any conflict with the opinions of this Court, the decision clearly does not determine the federal question for which the petition seeks a writ. Indeed, a principal purpose for this Court's use of certiorari jurisdiction is to resolve conflicts among the federal circuits and state courts concerning the meaning of provisions of federal law. *Braxton* v. *U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 500 U.S. 344, 114 L.Ed.2d 385 (1991). The purpose of this Court's certiorari jurisdiction is not merely to change the outcomes of state cases having no federal impact. There is no conflict in this case despite the petitioner's persistent misreliance upon an inapplicable body of law, namely special assessments for special benefits.

The petitioner attempts to create conflict and federal question jurisdiction where there is none. For example, the petitioner erroneously criticizes the Kentucky Court of Appeals decision as disobeying 5th and 14th Amendment due process, equal protection and takings considerations. The vehicle that the petitioner uses for these assertions is *Village of Norwood* v. *Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), an Ohio special assessment street construction case which held that special assessments require special benefits. The petitioner then argues that the Kentucky Court of Appeals decision conflicts with the special benefits requirements of *Village of Norwood*. Despite the petitioner's misreliance on special assessments and special benefits law, it is obvious that *Village of Norwood* and the 5th and 14th Amendments do not appear in the Kentucky Court of Appeals decision. Moreover, *Village of Norwood* and special assessments law are wholly inapplicable to this case. Nor was a 5th or 14th Amendment discussion necessary to the court's decision since ample state law ex-

isted for the court to follow, particularly the established state rule of *Curtis, supra.* Clearly, state substantive law controlled the outcome of this case, not the issues of *Village of Norwood* or the 5th or 14th Amendments. In construing the Authority's statutes and regulations, there simply was no reason for the Kentucky Court of Appeals to engage in a determination of federal constitutional law or to discuss whether the Authority's fees may violate *Village of Norwood* or any other special assessments law. Moreover, the Kentucky Court of Appeals decision lacks any national or federal significance worthy of this Court's limited resources.

III. THE KENTUCKY COURT OF APPEALS CORRECTLY RELIED UPON AN UNBROKEN LINE OF STATE AUTHORITY AND PROPERLY DECIDED THE CASE.

The petitioner erroneously equates the Authority's water use fees with special assessments for special benefits, as in neighborhood street construction cases. In following an unbroken line of state case law, however, the Kentucky Court of Appeals properly held that the water use fees are valid under the state's police power.

Since 1958 the law in Kentucky is that an area which lies within a watershed derives benefits from watershed projects through the general improvement of conditions or health, comfort and convenience and the resulting general enhancement of values in the area. *Curtis, supra,* 311 S.W.2d at 382.

In 1964 the *Curtis* rule was followed in *Woolsley* v. *Big Reedy Creek Watershed, supra,* wherein the court construed state watershed conservation statutes enacted in the 1950's by the Kentucky legislature.[4] The court re-

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[4]Contrary to the petitioner's assertions, watershed management concepts have existed in Kentucky at least four decades as evidenced by the state legislature's enactments of watershed conservancy statutes. Such statutes were involved in *Woolsley v Big Reedy Creek Watershed, supra.*

jected the plaintiffs' claim that a watershed project could not benefit them.

> [T]hey do not show that their property will not be benefited through a general enhancement of values in the district, which benefit has been held to be a sufficient basis for imposing a share of the cost of a watershed improvement project. *See Curtis* v. *Louisville & Jefferson County Metropolitan Sewer District,* Ky., 311 S.W.2d 378.

Id., 383 S.W.2d at 137. In 1989, the *Curtis* rule was followed in *Long Run Baptist Association, supra,* 775 S.W.2d 520, 522 (1989).

> [A]ppellants argue that there are some property owners who receive no benefit from the [water drainage] plan because they constructed their own system or because the storm water run off drains from their property directly into the Ohio River. However, similar arguments were presented in and rejected in *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District,* 311 S.W.2d 378 (1958), where property owners argued that KRS 76.260 (which was later repealed) was unconstitutional because it established a conclusive presumption that all land within a designated surface drainage area would receive some benefit. Because some property was at an elevation high enough to provide a vested right to the free flow of surface water, property owners argued that such property could not be benefited by the improvement. The court disagreed.
>
> > We think that in the case of a surface drainage improvement, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area and the general enhancement of values in the area. The circuit court held that all property in the area could

be deemed to be benefited, and we affirm that holding.

Id. at 382.

In correctly applying the common law rule of these state cases, the Kentucky Court of Appeals concluded that the petitioner's actual use of the basin's watershed and its discharge into it was a sufficient basis under state law for assessment of the water use fees. Moreover, contrary to the petitioner's claim, Kentucky is not the only state to adopt user fees to pay for watershed management and protection and to hold that the fees are *not* to be viewed as special assessments requiring special benefits. In *Teter* v. *Clark County*, 104 Wash.2d 227, 704 P.2d 1171 (1985), the Washington Supreme Court similarly held that under the state's police powers a water management department may properly be funded by user fees despite assertions that properties do not receive "special benefits" as may be required under a special assessments case. The court correctly noted that under a police power analysis "[t]he special benefit idea does not enter into the picture at all." *Id.* at 1176. Indeed, the Authority has long maintained that its fees are based on a valid exercise of its police powers. Such police power is an essential attribute of government.[5] *Roe* v. *Commonwealth*, Ky., 405 S.W.2d 25, 27 (1966). There is little reason for this Court to review the Commonwealth's valid exercise of its police powers, particularly where the Kentucky Court of Appeals decision did not determine any federal law issues.

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[5]The petitioner erroneously claims that the Authority assembled police power arguments in support of the fees "[a]s an apparent afterthought, subsequent to the trial court opinion...." Pet. Br., p. 22. However, the police power was expressly argued by the Authority in the trial court as evidenced by pages 40 - 41 of its trial court brief, entitled "*The Tier I Fees Are a Valid Exercise of the Authority's Police Powers.*"

IV. EVEN IF FEDERAL QUESTION JURISDICTION EXISTED, THE ISSUES IN THIS CASE LACK SUFFICIENT IMPORTANCE TO WARRANT THIS COURT'S REVIEW.

Aside from the jurisdictional defect under the rule of *Michigan* v. *Long, supra,* that the state court decision lacks the federal question alleged by the petitioner, the issues in the case lack any importance which would warrant this Court's investment of its valuable and limited judicial resources. Kentucky's highest court has twice rejected this case by declining transfer of the case (*see* Resp. App., p. 1a) and denying discretionary review. Even if there were bona fide federal issues in this case, which there are not, it would seem anomalous for this Court to accept the case when the Kentucky Supreme Court has itself twice declined review. Certainly, this case which was decided on independent and adequate state ground cannot be more important to this Court than to the Kentucky Supreme Court. Moreover, the only federal question determinations in the Kentucky Court of Appeals decision are those dealing with the petitioner's Commerce and Supremacy Clause arguments to which the court stated "[w]e find no merit." Opinion, Pet. App., p. 7a. Neither of those issues is included in the petition and the law on those issues is nevertheless well settled.

V. THE PETITIONER'S ARGUMENTS MISCONSTRUE THE KENTUCKY COURT OF APPEALS OPINION.

The petitioner claims that the "Supreme Court of Kentucky" [sic] denied petitioner the right to question the fees and benefits. Pet. Br., p. 12. To the contrary, the petitioner initiated this state court action and has had nearly three years of involvement in litigating the issues. The petitioner has simply lost on the merits and the Kentucky Supreme Court denied the petitioner's motion for discretionary review. Also, the petitioner erroneously asserts that the Kentucky Court of Appeals' opinion "establishes"

law. Pet. Br., p. 12. However, the Court of Appeals decision properly followed state precedent and determined that the petitioner was responsible for payment for its *actual use* of the water resources of the Kentucky River basin under the Authority's statutes and regulations.

Contrary to what the petitioner claims, the fees charged to the City for its use of the basin's waters are not simply a function of the City's geographical location within the basin. Rather, it is undeniable that the petitioner indeed *uses* the basin's water and impacts the basin's water supply and quality. On a daily basis the petitioner withdraws more than 3 million gallons of water from the basin's waters and discharges its used water into the basin. It is reasonable therefore for the petitioner to pay water use fees which in turn are used for watershed protection and management. It is anomalous for the petitioner to claim that no lawful and rational relationship exists between the fees assessed and the petitioner's use and discharge into the river basin. The Court of Appeals construction of the Authority's water use fee statutes and regulations shows that they are reasonably related to the Commonwealth's interest of protecting and conserving the water resources of the Kentucky River basin. *See Portwood* v. *Falls City Brewing Company, supra,* at 536; *Skidmore* v. *City of Elizabethtown, supra,* at 5.

VI. THE PETITION ATTEMPTS TO CREATE FEDERAL ISSUES AND CONFLICT WHERE NONE EXIST.

The petitioner attempts to create conflict between federal and state law. Despite that the state court opinion rests on independent and adequate state law ground, the petitioner nonetheless argues that *Village of Norwood, supra,* an 1898 special assessment case, conflicts with the state court's decision. However, the petitioner makes meritless arguments to avoid compliance with state law and to avoid paying legitimate water use fees.

The Kentucky Court of Appeals correctly recognized the inapplicability of the petitioner's 5th and 14th Amendment arguments and properly decided the case based upon substantive Kentucky precedents. The rule founded in *Curtis, supra,* was followed by *Woolsley* v. *Big Reedy Creek Watershed, supra* and *Long Run Baptist Assoc., supra.* The Kentucky Court of Appeals decision correctly applied and followed this established state rule. Contrary to the petitioner's claims, the Kentucky Court of Appeals opinion did not "establish" a rule or conclusive presumption. Pet. Br., p. 10. Rather, the court correctly applied substantive state law which has existed in this Commonwealth for 39 years.

Clearly, the law of special assessments for special benefits does not apply to this case in lieu of *Curtis.* The fees in this case are based upon the Authority's exercise of its legislatively granted police powers. The special assessments case of *Village of Norwood* does not change this result nor is it in conflict with the Kentucky Court of Appeals decision. In *Norwood* the property of an abutting landowner was levied upon for street construction improvements. However, it is plainly obvious that no such facts exist in this case. Moreover, it is inconsequential that a Kentucky special assessments case following *Norwood* likewise held that public street construction could lead to special assessments on adjoining and benefited property. *Barfield* v. *Gleason,* 111 Ky. 491, 63 S.W.2d 964 (1901). It too does not alter the outcome of this case. The third case erroneously relied upon by the petitioner is *Casey* v. *Richland County Council,* 282 S.C. 387, 320 S.E.2d 443 (1984), which under the South Carolina constitution held invalid on equal protection grounds a county water and sewer charge where the plaintiff already was being serviced and charged by the City of Columbia and could not use the county's system. Since the plaintiff was not in the county system and could not use the county system, the

South Carolina court viewed the county's charge as general revenue raising and therefore an impermissible tax. However, this case is likewise inapplicable. Unlike the plaintiff in *Casey*, the petitioner herein actually uses the waters of the Kentucky River basin.

The case at bar is not one involving special assessments for special benefits, nor does it involve taxes. Neither *Village of Norwood* nor any other cases cited by the petitioner are applicable. Nor does the Kentucky Court of Appeals decision in any way involve the petitioner's asserted federal constitutional concerns. There is no basis for certiorari jurisdiction in this case.

* * *

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF KENTUCKY

95-SC-52-T

KENTUCKY RIVER AUTHORITY,
PHILLIP J. SHEPHERD,
CHARLES W. CARR,
TIM DORMAN,
JUDGE W. NEAL CASSITY,
DR. DONALD C. HANEY,
MARTIN HOWARD LOWRY,
EDWARD FOREE,
GREG GINTER,
THOMAS M. JONES,
RALPH E. MCCLANAHAN, and
BETTYE F. WHITAKER - - - - - *Movants*

v.

CITY OF DANVILLE, KENTUCKY - - *Respondent*

Boyle Circuit Court
Hon. Stephen M. Shewmaker, Judge
94-CI-278

ORDER DENYING TRANSFER

Movants motion for transfer of the above styled action from the Court of Appeals of Kentucky to the Supreme Court of Kentucky is denied.

ENTERED: March 14, 1995

/s/ Robert F. Stephens
CHIEF JUSTICE